J. Kerridge.

ELEMENTS

OF THE

LAW OF CONTRACT

BY

A. T. CARTER

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND SOME TIME
ONE OF THE READERS TO THE INNS OF COURT.

THIRD EDITION

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A. T. C.

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THE LAW OF CONTRACT

CHAPTER I

THE NATURE OF CONTRACT

A CONTRACT is a communicated agreement between two or more parties as to future conduct which has a legal operation, *i.e.* which is regarded by the law as valid, and on which if properly proved[1] an action will lie. Agreement is shown to exist at the moment when one person expressly or impliedly accepts an offer which another person expressly or impliedly makes to him.[2]

Only those agreements have a legal operation which the parties intend to have such operation. Such intention is a matter of fact, and must be inferred from the parties' writing, words, or

[1] See p. 48.

[2] 'Contract' is not synonymous with 'obligation'. A legal obligation is a *juris vinculum*, a legal relation between two parties of which the two sides are legal right and legal duty. Contract is one source of such obligation, but not the only one. The Roman lawyers gave four specific sources, viz. contract, *quasi* contract, delict, *quasi* delict, to which we may add the misnamed 'contracts of record'.

conduct taken in connection with the surrounding circumstances.

Thus we exclude social agreements, agreements in opinion, flourishing statements of intention, mere intimations of readiness to do business, conveyances and trusts.

Illustrations.

(*a*) A. and B. agree to dine together, or agree that it will be a hard winter. No contract.

(*b*) A. tells B. in conversation that he intends giving £100 to any one who marries A.'s daughter with his consent. B. does so, and sues A. for the money. *Held*, no contract, for these were 'general words spoken to excite suitors'. (*Week* v. *Tibold.*)

Roll. Abr. p. 6.

(*c*) In 1873 a father, before his daughter's marriage, wrote to her intended husband: 'With my large family, Eliza will have little fortune; she will have a share of what I leave after the death of her mother.' The intended husband, a foreigner, took this letter as giving him some rights, and married the daughter. In 1898 the father died worth £100,000, leaving £2000 to the daughter, and the residue between his other six children equally. In an action brought for an equal share, *held* that the letter was no contract, but merely an expression of intention; and that if it had been a contract, a share had in fact been left. (*In re Fickus, Farina* v. *Fickus.*)

1900, 1 Ch. 331.

(*d*) A., an auctioneer, advertises an auction for a certain day. B. comes to bid, and finds that the auction is put off. *Held*, no contract between the parties, but a mere declaration of intention on A.'s part which might come to something or might not. (*Harris* v. *Nickerson.*)

L. R. 8 Q. B. 286.

So if A., a secondhand bookseller, sends out his monthly catalogue, or if being a bootmaker he displays his wares

ticketed in his window, it is highly probable that without further evidence of A.'s intention to offer the particular items for sale, B. would fail in an action against A. if A. declined to sell any article that B. selected. The conduct of A. would probably be held to be merely an invitation to do business.

(*e*) A. telegraphed to B., 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price.' B. telegraphed 'Lowest price for Bumper Hall Pen £900.' A. telegraphed 'We agree to buy Bumper Hall Pen for £900 asked by you. Send us the title deeds', but received no reply. *Held*, no contract. B.'s telegram was not intended to be an offer, and the final telegram was not an acceptance, but an offer which was not accepted. (*Harvey* v. *Facey*.) 1893, A. C. 552. (P. C.)

(*f*) A. conveys land to B., or settles money in trust, B. being the trustee. This is not contract, but conveyance. There is no outstanding obligation between A. and B. The affair is finished and done with, the land handed over or the money paid.

Agreement must be communicated or expressed by—

(*a*) Writing under seal, *i.e.* a deed or specialty;

(*b*) Writing not under seal;

(*c*) Words spoken;

(*d*) Conduct.

Contracts made otherwise than under seal, viz. those made by methods (*b*), (*c*), and (*d*), are known as 'simple', (*b*) and (*c*) also as 'parol' contracts.

Simple contracts differ in two important respects from contracts under seal:—

Inf. p. 22.

(*a*) Simple contracts require the presence of 'consideration' to make them valid; those under seal are valid because of their Form, apart from consideration.

21 Jac. I., c. 16, § 3. 19 & 20 Vict. c. 97, § 9. 3 & 4 W. IV. c. 42, § 3.

(*b*) An action on a simple contract is barred by the Statute of Limitations in six years; while an action on a deed is not barred for twenty years.[1]

Inf. p. 50. *Inf.* p. 95.

Any person (with certain exceptions) can make any contract (with certain exceptions) that he pleases. The person must be under no legal disability, the contract must not be contrary to law, morality, public policy, or, within certain limits, impossible.

The agreement on which contract is based must be **real** agreement. It cannot be said that apparent agreement secured either under Mistake, or by Fraudulent or Innocent Misrepresentation, Duress, or Undue Influence is **real** agreement.

Inf. p. 75.

If these tests are not satisfied, the agreement is either **voidable** at the option of one party or absolutely **void**. A voidable contract is an agreement which one party may at his option treat as never having been binding on him; what is called a '**void** contract' is, in the eye of the law, no contract at all, never has been, and never can be.

The law says that certain agreements must be made under seal, that others must be made in

[1] See *infra*, p. 138.

writing, that others must be supported by written or other statutory evidence, and that the rest may be made verbally or by conduct. But as to the last class, it is one thing to make a contract and another to prove to the satisfaction of a judge and jury that it was made. Sale of Goods Act, § 4.

Agreement is not always expressed in a manner free from doubt. **Courts of justice try to give effect to what the parties really intend.** As persons are presumed to say what they mean, and to mean what they say, what the courts decide in a disputed case is, not what the parties meant, but what their words or conduct mean. The decision of difficulties of this kind falls under the head of the Interpretation of contract. *Inf.* p. 154.

An agreement must necessarily be made in the form, or what is equivalent to the form, of an offer of terms on the one side, and an acceptance of those terms on the other, communicated between the parties.[1]

A contract accordingly is equivalent either to a promise *plus* Consideration or a promise *plus* Form.

An offer can, subject possibly to the following exception, always be revoked until it is accepted, a promise cannot.

Exception.—An offer under seal is, it is sometimes said, irrevocable, and binds the offeror even though the offeree

[1] Leake on Contracts, 5th ed., p. 9.

is in ignorance of the offer, and remains open for the offeree's acceptance when he hears of it. The case of *Xenos* v. *Wickham*, however, which is sometimes cited as authority for this proposition, gives no support to it. But the offeree may when he hears of the offer refuse it, and then the offeror will be no longer bound. (*Butler and Baker's Case.*)

L. R. 2 H. L. 296.

3 Co. Rep. 6.

CHAPTER II

THE FORMATION OF CONTRACT

Offer and Acceptance

In simple contracts the offer and acceptance must both be communicated by writing, words, or conduct. If the agreement be expressed in words or writing, it is called an **express contract,** if the agreement is left to be inferred from conduct, it is commonly called an **implied contract,** *e.g.* A. puts out buns on his shop counter, B. comes in and eats one. In all cases there must be evidence that the minds of the parties are *ad idem.*

See App. C.

An offer which is not communicated to the other party is of no legal value. A man cannot be said to accept an offer of which he is in ignorance, nor can he be forced to accept and pay for services which he did not know were being rendered, and which therefore he could not decline.

Illustrations.

(*a*) A. offers a reward to whosoever shall do a certain thing. B. does the thing, not knowing of the advertised reward. B. has not accepted, and so cannot claim the

38 N. Y. 248. reward. (*Fitch* v. *Snedaker*, an American case and not binding in this country, but almost certainly correct in principle.)

(*b*) A. offers a reward for information which may lead to the apprehension of a murderer. B. gives the information because she thinks she is about to die and wishes to ease her conscience. She recovered and claimed her reward. *Held*, that her motive was immaterial, and that
4 B. & A. 621. she was entitled. (*Williams* v. *Carwardine*.) Nothing is said in the report as to whether she knew of the reward or
(1892) 2 Q. B. 489. not. But Hawkins, J., in a note to *Carlill* v. *Carbolic Smoke Ball Co.*, says that he assumes that, in *Williams* v. *Carwardine*, B. knew of the offered reward when she gave the information.

(*c*) A. is engaged as captain of B.'s ship for a certain voyage. In the course of the voyage he throws up his command, but helps to work the vessel home, and then sues for services rendered. *Held*, that as B. had no opportunity of declining the services, no acceptance of the services could be implied, nor any promise to pay for them. 'Suppose', said Pollock, B., 'I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another's shoes, what can the other do but put them on? Is that evidence of a contract
25 L. J. Ex 329. to pay for the cleaning?' (*Taylor* v. *Laird*.)

An acceptance must be communicated by writing, words, or conduct, and, in any particular case, in the manner and within the time expressly or impliedly indicated by the offeror, or, if no time limit is specified, within a reasonable time. It must be absolute and, if the circumstances allow, in the unaltered terms of the offer.

Illustrations.

(*a*) A. offers to buy flour of B., and requires an answer by the cart which brought the offer. B. sends his answer by mail, mistakenly thinking that he would save time by so doing. *Held*, that A. was entitled, if he chose, to refuse the flour. (*Eliason* v. *Henshaw*, in the Supreme Court of the U. S. A.) 4 Wheat. 225.

(*b*) A. wrote on 28th June offering to take shares in a company. On 23rd November his offer was accepted. A. then refused them. *Held*, that the offer had not been accepted within a reasonable time, and that A. was not bound. (*Ramsgate Hotel Co.* v. *Montefiore.*) L. R. 1 Ex. 109.

What is a 'reasonable' time depends not on 'ordinary circumstances' but on the actual circumstances in each case. (*Hick* v. *Raymond and Reid.*) 1893, A. C. 22.

(*c*) A. writes to B. offering to buy B.'s mare if B. will warrant her sound and quiet in harness. B. replies warranting her sound and quiet in *single* harness. *Held*, no contract. (*Jordan* v. *Norton.*) 4 M. & W. 155.

(*d*) A. offers to sell property to B. B. accepts the offer 'subject to the terms being arranged between my solicitor and yours.' *Held*, no agreement, the acceptance being not absolute but conditional. (*Honeyman* v. *Marryat.*) 6 H. L. C. 112.

(*e*) It is probable that in the absence of express instructions there is an implied authority given by the offeror to the offeree to accept in the manner which, under the circumstances, is reasonable and according to the ordinary usages of mankind. This inference would in many cases authorise an acceptance by post, and would be strengthened by the fact that the offer itself had been made in that manner. (See *Henthorn* v. *Fraser* (Lord Herschell's judgment) and *Household Fire Insurance Co.* v. *Grant* (judgment of Thesiger, L. J.).) So in *Queuerdnaine* v. *Cole* it was held that an offer by telegram raises the presumption 1892, 2 Ch. 27, C. A. 4 Ex. D. 216. 2 W. R. 185.

that a prompt reply is expected, and that in such a case acceptance by letter may be evidence of such unreasonable delay as to justify a revocation of the offer.

(*f*) A company advertises that if any one will use its patent specific for a certain time in a certain way, and afterwards contracts influenza, the company will pay him £100. B. complies with all the conditions, but catches the disorder. *Held*, that B. had accepted the offer in the manner prescribed, and that the company was liable. (*Carlill* v. *The Carbolic Smoke Ball Co.*)

(1892) 2 Q. B. 484 and (1893) 1 Q. B. 256, C. A.

An offer by advertisement is not made to a definite person but to any one who will do a certain thing. Acceptance consists in conduct, viz. in doing the prescribed thing, and is communicated, at the latest, when the fulfilment of the advertised offer is claimed.

(*g*) A. offers a farm to B. for £1000. B. replies, saying he will give £950. A. declines this, and B. then says he will give £1000. *Held*, that on these facts there was no contract, for varying an offer is equivalent to a refusal and to the making a new offer. The original offer is dead. (*Hyde* v. *Wrench.*)

Beav. 334.

A mere mental acceptance not evidenced by words or conduct is in the eye of the law no acceptance. An offeror cannot force the offeree to choose between expressly declining and being bound. He cannot make the offeree's silence mean consent.

Illustration.

A. writes to B. offering to buy B.'s horse for £30 15*s.*, adding, 'If I hear no more about him, I shall consider the horse is mine at £30 15*s.*' B. made no reply to this offer, although it appeared at the trial that he had made up his

mind to accept it. *Held*, that there was no contract. (*Felthouse* v. *Bindley*.) 11 C. B. N. S. 869.

There are many contracts that are made by the delivery by one of the parties to the other of a document in common form containing the conditions and terms imposed by the person offering. As a general rule, acceptance of such a document, *e.g.* a railway or steamboat ticket, is an acceptance of the terms. But there are certain exceptions—

(*a*) If the transaction is such that the party accepting may well think that the document has no terms at all;

(*b*) If fraud is present, *e.g.* misleading printing;

(*c*) If the acceptor is in fact misled apart from fraud;

(*d*) Probably, if the conditions are unreasonable or irrelevant. (*Watkins* v. *Rymill*.) 10 Q. B. D. 178.

These are questions of fact, and the House of Lords, in *Richardson, Spence & Co.* v. *Rowntree* (*vide infra*), has laid down the proper questions to be left to the jury in such cases.

Illustrations.

(*a*) A. sued a steamship company for damages for injuries caused by its negligence. The company pleaded that it had protected itself by conditions printed on the ticket. These conditions were printed in small type, and were, moreover, obscured by words stamped across them in red ink. The proper questions left were as follows:—

i. Did the plaintiff know there was writing or printing on the ticket? Answer—Yes.

ii. Did she know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage? Answer—No.

iii. Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions? Answer—No.

1894, A. C. 217. Judgment for the plaintiff. (*Richardson, Spence & Co.* v. *Rowntree.*)

(*b*) If a passenger takes a ticket on the face of which is printed 'subject to conditions on the other side', and knows that there are conditions but does not choose to read them, he may be taken as 'content to be bound without ascertaining'. (*Harris* v. *G. W. Railway Co.*) 1 Q. B. D. 515.

Contracts made through the post present some peculiar and conventional features.

In these cases, the Post Office is the agent of the offeror, and the offer so made is not communicated till it is received and read. Where the offeror expressly or impliedly authorises the sending of an acceptance by post, such acceptance is communicated when the accepting letter correctly addressed is dropped into the pillar-box. At that moment the offer is turned into a promise and is irrevocable. A revocation of an offer by post must be communicated, and it is not communicated till the revoking letter is received and, probably, read. It follows that if A. wishes to revoke his offer, his revocation must reach B. before B. posts his letter of acceptance. The acceptance, once the letter is posted, is unaffected by the subsequent fate, delay or destruction of the letter. Both A.

and B. are bound. These rules are, as English law now stands, absolute in the absence of express stipulation on A.'s part, who may, if he choose, safeguard himself by saying that he will not be bound till he gets the letter of acceptance, or unless he gets it within a certain time.

Illustrations.

(*a*) A. makes on 1st October an offer to B. requesting reply by cable; B. receives the offer on the 11th and at once accepts by cable. On the 8th A. had posted a letter revoking his offer, which arrived after the acceptance was cabled. *Held*, that the revocation was inoperative and that A. was bound. (*Byrne* v. *Van Tienhoven.*) 5 C. P. D. 344.

(*b*) A. offers to take shares in a company, impliedly requesting an answer by post. The letter of acceptance was duly posted but was lost and never came to hand. *Held*, that A. was nevertheless bound. (*Household Fire Insurance Co.* v. *Grant.*) 4 Ex. D. 216.

(*c*) A. made an offer conditional on 'receiving an answer by return of post'. A. misdirected the letter, which was consequently delayed in transmission. On receiving it B. accepted by return of post. Meantime A. sold the goods to some one else. *Held*, that the contract was complete and binding. (*Adams* v. *Lindsell.*) 1 B. & Ald. 681.

(*d*) A. makes an offer to B. in a letter delivered by hand. On the same day two letters were posted, one by A. withdrawing his offer, one by B. accepting it. A.'s letter of withdrawal was received by B., before B.'s acceptance was received by A. *Held*, nevertheless, that the withdrawal was too late. An offer which, according to ordinary usage, is likely to be accepted by letter is accepted when the letter is posted, but a withdrawal of such an

offer dates only from the time when the fact of the withdrawal is known to the other party. (*Henthorn* v. *Fraser*.)

(1892) 2 Ch. 27, C. A.

(*e*) A. applies for shares in a company; the secretary gave the letter of allotment to a postman to post. The postman carried it in his pocket for some time, and before he posted it a letter from A. withdrawing his application was received and opened by the secretary. The Post Office forbids postmen to take charge of letters for the post. *Held*, no contract. Delivery to the postman was not delivery to the post office. (*In re London and Northern Bank, Ex parte Jones.*)

1900, 1 Ch. 220.

The principle on which these cases are decided is apparently that where, either from A.'s conduct or from surrounding circumstances, it may be inferred that the Post Office is A.'s agent for receiving the acceptance, delivery to the Post Office is delivery and communication to A. In case (*e*) it will be noticed that if the postman is agent for anybody he is agent for the company and not for A. or for the Post Office.

This principle is capable of application to cases where a written or verbal offer is sent by a messenger with a request that the answer be given to the messenger who will wait. In such a case it might well be held that handing the acceptance to the messenger was communication to his principal, and that the principal was bound, though the messenger fell dead on his homeward way, or stayed drinking twenty-four hours in a tavern. And it would probably be held, that if the proposer changed his mind and sent a second messenger with a revocation, who met the first messenger with the acceptance in his pocket, such a revocation would be inoperative. Much, however, might depend on the particular circumstances from which the intention of the proposer would be inferred.

Apart from the conventional rules set out above,

the law is plain; if A.'s offer is accepted by B. it becomes a promise and is irrevocable, but before such acceptance A. can, by giving notice, revoke his offer at any moment, unless he has sold an option to the other party, and has thus bound himself not to revoke. In such a case, though A. is bound to sell if B. calls, B. is not bound to call —he has purchased an option. This is the answer to the academic question: **Whether one party to a contract may be bound and not the other?**

'The cases where one party is alleged to be bound and not the other are merely where A. has for valuable consideration bound himself to sell on certain terms if the other chooses to avail himself. It is merely an offer which cannot be withdrawn, and does not connote an agreement to buy.' (Per Herschell, L.C., in *Helby* v. *Matthews.*) 1895, A. C. 477.

Illustrations.

(*a*) A corporation advertises for tenders for the supply of certain articles as they may require them over a period of twelve months. B., amongst others, sends in a tender at a certain price which is accepted. After one or two orders have been received and executed, B. refuses to execute an order *he has just received. Held*, B. is liable. He is taken to have been making a continuing offer, which is, by each order received, turned into a promise *pro tanto.* (*G. N. Ry. Co.* v. *Witham.*) If, however, the terms of the contract expressly or impliedly permitted the company to order from others and not from B., and B. gives the company notice that *he will execute no further orders*, he L. R. 9 C. P. 16.

is probably within his rights, for he has got no consider-
1901, 1 K. B. 683. ation for keeping his offer open. But in *The Gloucester Municipal Election Petition* a Divisional Court seems to have held that if, according to the true construction of the advertisement the tender and the acceptance, a corporation was bound, not, indeed, *to order the specified articles from B., but to order them from no one else,* here was a valuable consideration.

Is a revocation operative without notice?

This is an interesting question. A. offers to sell his horse Julius Cæsar to B. for 50 guineas. B. asks A. to keep the offer open till four o'clock. A. agrees. At 3.50 P.M. B. comes to A. and accepts, in ignorance that A. sold the horse an hour ago to C. Has B. a remedy against A.?

Some points are clear, viz. (i.) that A.'s offer does not continue beyond four o'clock; (ii.) that as there is no consideration for A. keeping the offer open, he can by giving notice to B. before four o'clock validly revoke the
3 T. R. 653. offer (*Cooke* v. *Oxley*); (iii) that if A. sells the horse and B. hears of the sale from any source B. cannot thereafter
2 Ch. D. 463. validly accept. (*Dickenson* v. *Dodds.*)

Beyond this, there is no direct authority. In *Cooke* v. *Oxley*, in which the circumstances were as stated above, the point was not properly raised. The case was tried under the old system of pleading: and it was held that an agreement was not sufficiently alleged on the pleadings, because the defendant was not bound to continue his offer, and it was not averred that he really did so. Judgment accordingly for the defendant. In *Dickenson* v. *Dodds* B. knew of the sale from another source, but Mellish, L.J., with some qualification, and James, L.J., in an unqualified manner, expressed the opinion that a communication of the withdrawal of the offer was, apart from this circumstance, not required. This expression of opi-

nion was, however, not necessary to the decision, and so is an *obiter dictum.*

On the other hand, in three cases—*Byrne* v. *Van Tienhoven*, *Stevenson* v. *McLean*, and *Henthorn* v. *Fraser*—expressions were used by most eminent judges indicating that in *all* cases a revocation to be efficacious must be communicated. But, as in these cases, the negotiations were conducted through the post, and were subject to the special rules governing contracts made in that manner, these expressions were unnecessary to the decision, and so are *obiter.* 5 C. P. D. 344. 5 Q. B. D. 346. 1892, 2 Ch. 27, C. A.

One view, therefore, is that unless revocation is communicated, the offer must be taken to be continuing till the time specified, or, what is the same thing, *till a reasonable time has elapsed.* So if A., after having offered property to B., sells it to C., there is in fact a revocation, but one which is not operative to withdraw the first offer without giving notice of the sale to B. If the first offer be accepted before such notice there will be two binding contracts against A., raising a question of priority in equity as to the right to the specific property.[1]

The other view is that in fact there has never been a *consensus ad idem* of the two minds, and that though a continuation of the offer might be inferred by a jury as a matter of fact from the absence of any evidence of withdrawal, that inference cannot be supported in face of the fact that the property has been already sold to some one else.

According to this view, then, all that A. need do is to do some act which clearly shows his intention to revoke, this intention being matter of fact, and it being immaterial whether B. hears of it or not.

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[1] Leake on Contracts, 5th ed., p. 22.

An offer is also determined by the death of the offeror before acceptance, though the death is unknown to the other party. (Per Mellish, L.J., 2 Ch. D. 475. in *Dickenson* v. *Dodds*.)

Offers accordingly can be determined by—

(*a*) Revocation;

(*b*) By the death of either party;

(*c*) By the breach of any condition imposed by the offeror;

(*d*) By lapse of time.

CHAPTER III

FORM AND CONSIDERATION

The one Formal contract of the English law is the Deed or, as it is sometimes called, the Covenant or Specialty.

The Judgment, and the Recognisance, though they create obligation, are not contracts properly so called.

The Judgment of a Court of Record, *i.e.* a Court whose acts and judicial proceedings are enrolled for a perpetual memorial and testimony, and whose rolls are its records, 'merges' or extinguishes the cause of action on which it is founded.

'If there be a breach of contract or wrong done . . . by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage, and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result: hence the legal maxim *transit in rem judicatam*, the cause of action is changed into matter of record which is of a higher nature and the inferior remedy is merged in the higher.' (Per cur. *King* v. *Hoare.*) 3 M. & W.

So if an action has been successfully brought on a simple contract or a deed, and judgment obtained, there is a merger in the judgment, and if default

is made, proceedings are taken not on the original cause of action, but on the judgment.

A Recognisance is an obligation in the form of an acknowledgment of a debt, made before a judge or other officer having authority for the purpose, and enrolled in a court of record. The debt is acknowledged to be due to the Crown, or to an officer or to the plaintiff in an action, and is conditional to secure various objects, such as to appear at the assizes, to come up for judgment when called upon, to keep the peace, or to become bail. A recognisance, like a judgment, is proved by the record.[1]

A deed binds because of the formality of its execution, which is by sealing and delivery. It is usual, now that most people can write, to sign as well. 'Delivery' is an actual handing over of the deed or any proceeding by act or word showing the intention of the party. The usual form is to place a finger on the wax or wafer and say, 'I deliver this as my act and deed.'

[1] The following is a form of Recognisance used at the assizes, after conviction:—

The Clerk of Assize: John Smith, do you acknowledge to owe to our sovereign lord the king the sum of £5, the condition of this recognisance being that you do appear at such assizes of this county as you shall receive notice so to do, there to hear and abide by the judgment of the court upon this conviction for felony: and that meantime you be of good behaviour and keep the peace towards all the king's subjects: do you consent to be so bound?

The prisoner: I do.

The delivery of a deed may be made upon a condition, so that the delivery is not complete, and the deed not binding until the condition is satisfied. It is then called an Escrow. The condition may be expressly declared, or it may sufficiently appear from the circumstances attending the delivery. Such conditional delivery may be made, while the party retains the deed in his own possession, or upon delivery to a third person. If delivery is made to the other party there is a presumption that the condition has been fulfilled.

An **Escrow,** then, is a deed delivered subject to a condition precedent, which does not operate till the condition is fulfilled.

A **Bond** is a promise under seal defeasible upon condition subsequent, *e.g.* A. promises by deed that he will pay B. £100 next Midsummer Day, but that if before that day such and such a thing should occur, the bond is to be void.

As a contract under seal is regarded as being of a higher nature than a simple contract, if an engagement by simple contract is afterwards embodied in a deed, the simple contract is 'merged' in the deed; and in virtue of this 'merger', in case of default, action is brought on the deed and not on the contract.

Certain contracts must be made under seal, *e.g.* leases for more than three years,[1] transfer of

[1] 29 Car. II. c. 3, §§ 1, 2; and 8 & 9 Vict. c. 106, § 3.

a British ship or any share therein,[1] sale of sculpture with copyright,[2] transfers of shares in companies governed by the Companies Clauses Act,[3] contracts of corporations, and gratuitous contracts, the two last by Common Law.

A promise under seal is good without 'consideration', while no other promise is. This only means that **damages** may be recovered for a breach of such a promise. **Specific performance** of such a promise will not be decreed.

Contracts **in restraint of trade** must be reasonable, **whether under seal or not** (*Mallan* v. *May*), and on that ground the absence of consideration in such a contract is fatal.

11 M. & W. at p. 665.

Though a contract under seal is good without consideration, yet if the defendant show that in fact there is a consideration behind the deed, but one which is **illegal** or **immoral,** the contract is void. (*Collins* v. *Blantern.*)

1 S. L. C. 87.

As contrasted with formal contracts, simple contracts depend for their validity on the presence of **consideration.**

A consideration is some *quid pro quo* agreed upon, showing that the promise is not gratuitous, in other words, a return made to the promisor for his promise, either a benefit to the promisor or what he regards as a benefit, or a detriment to the

[1] 57 & 58 Vict. c. 60, § 24.
[2] 64 Geo. III. c. 56.
[3] 8 & 9 Vict. c. 16, § 14.

promisee. Every consideration must be such as may be legally given. *Inf.* p. 95.

Every consideration must be either an **act**—including under this word a **forbearance**—or a **promise.**

All valid considerations are present considerations. The decisive moment is when the offer is accepted and the contract becomes complete. As any consideration that A. gets must be something in return for what A. does or promises, nothing that is past can be a consideration. As every consideration must be an **act now done** or a **promise now given,** every consideration must be present. **Every simple contract is made up of two present considerations.**

An act may be properly called an 'executed' consideration, and a promise may be properly called an 'executory' consideration, but it is a misuse of language to call it a 'future' consideration.

When both parties promise to do something, each promise is the consideration for the other, and the contract is called 'executory'. Each party is both promisor and promisee.

Illustrations.

(*a*) A., a bookseller, sells and delivers a book to B., who takes it away promising to pay. The two considerations are act and promise.

(*b*) A. promises to do certain services for B., and B. promises to pay £50. Both considerations are promises.

(*c*) 'In consideration that the plaintiff *had bought*

a horse of A., A. promised that it was sound.' A past consideration is no consideration, and so no contract.
3 Q. B. 234. (*Roscorla* v. *Thomas.*)

It has been sometimes suggested that there are exceptions to this rule that a past consideration is no consideration. If we except one class of case, mentioned hereafter (and even that is not clearly exceptional), these suggestions seem groundless. It is said that a service done on request will support a subsequent promise to pay for it, on the authority of the celebrated case of *Lampleigh* v. *Braithwait.* (*Vide infra.*) The true view seems to be that, as was said before, a contract can be inferred from the conduct of the parties. **From conduct can be inferred a request for services, or a promise to pay for services, or both request and promise.** To take a simple case. A. goes into a pastrycook's shop, picks up a bun, eats it, and then promises to pay. This is not a case of past consideration, for whether A. promises or not, he is bound to pay ; for the law has implied a promise from his conduct. The verbal promise is surplusage.

Illustrations.

(*a*) A. had feloniously slain a man and immediately requested B. to labour and do his endeavour to obtain his pardon from the King, whereupon B. did by all the means he could and many days' labour, do his endeavour, viz. in riding and journeying at his own charges from London to Roston, while the King was there, and to London back, and so to and from Newmarket to obtain pardon.

Afterwards, in consideration of the premises, A. did promise B. to give him £100. Judgment for B. for £100. (*Lampleigh* v. *Braithwait.*) 1 S. L. C. 151.

It is, perhaps, worth noticing that according to the report the defence set up relied not so much on the fact that the consideration was past, but that it did not appear that B. had done anything toward obtaining the pardon but riding up and down, and nothing done when he got there. To this the answer was that labour, though unsuccessful, is a good consideration. B. had done his endeavour. The defence of the past consideration was summarily disposed of, on the ground that the promise 'coupled itself' with the prior request, 'for it is like a case of commission'.

The decision admits a modern paraphrase. A request for services of a laborious character will entitle, though not compel, a jury to infer an intention of the parties that the services were not to be given free, but paid for. That inference is corroborated by the subsequent promise. No price being arranged, the reasonable price must be discovered. A. has himself named a sum which he obviously considers reasonable. Judgment for that amount. (See the judgments of Erle, C.J., in *Kennedy* v. *Broun*, and of Bowen, L.J., in *Stewart* v. *Casey.*) 13 C. B. N. S. 677. 1892, 1 Ch. 115.

In the above case the *promise* is implied.

(*b*) A pauper resided out of his parish of settlement, and the parish acknowledged its liability for his maintenance by making a weekly allowance. He fell ill and died. While ill he was attended by Wing, an apothecary, who was subsequently promised payment of his bill by Mill, the overseer of the parish of settlement. Judgment for Wing. (*Wing* v. *Mill.*) 1 B. & Ald. 104.

Here the request and perhaps the promise is implied.

(*c*) The same circumstances, except that no promise was given, and when the bill for medical attendance was

sent in to the parish of settlement payment was refused on that ground. Lord Lyndhurst held the payment of the allowance was conduct equivalent to a request that the pauper should not be removed and to a promise to allow what was requisite. (*Paynter* v. *Williams.*)

1 C. & M. 810.

Here both request and promise are implied.

In fine, a past consideration 'will sustain only such a promise as the law will imply'. (*Elderton* v. *Emmens*, per Maule, J.)

4 C. B. 479.

The one exceptional case above alluded to is where there has been a legal right which is become devoid of legal remedy. Such, for instance, is the case of a promise made by a debtor whose liability has been barred by the Statute of Limitations. He may renounce the benefit of the law and promise to pay his debt as an honest man should: he is then bound to do it. (*Earle* v. *Oliver*, per Parke, B.)

2 Ex. 71.

It is sometimes said that 'consideration must move from the promisee'. This only means that only the parties to a contract can sue on it: *e.g.* if in return for £10 which A. gives B., B. promises to perform services for C., C. cannot sue B. on the promise.

The law does not consider the **adequacy** of the consideration, but only its **reality.** If the consideration, is in any way a return, the fact that in the eyes of most people it is worthless will not invalidate the contract. The parties are left to make their own bargain. *E.g.* permission to weigh

a pair of boilers has been held a good consideration (*Bainbridge* v. *Firmstone*); so also the return of a written guarantee though it was afterwards found to be unenforceable, because one party **obtained what he desired** and the other **parted with what he might have kept.** (*Haigh* v. *Brooks.*) 8 A. & E. 743. 10 A. & E. 309.

But the consideration must be **real.** That is, it must not be absolutely, physically, or legally impossible, it must not be illegal, and it must not be something which the one party is already bound to do or refrain from doing, either in virtue of a contract *with the other party*, or in virtue of his public duty.

Illustrations.

(*a*) A. gave a lease of land to B. under which B. undertook to dig from the land not less than 1000 tons of potter's clay per annum, paying a royalty to A. per ton. There were not, in fact, 1000 tons there. *Held*, that this was a good defence to an action by A., because the agreement was made *on the assumption that the clay was there.* (*Clifford* v. *Watts.*) L. R. 5 C. P. 577.

But the impossibility must be *absolute*, not merely relative to the person: *e.g.* a promise by A. to pay money. A. may have no money, but there is plenty in the world.

(*b*) A., a steward, in return for a promise of £40, promises to give B. a discharge for a debt which B. owes his master. *Held*, that this promise was worthless, for a servant cannot give a discharge of his master's debt. (*Harvey* v. *Gibbons.*) 2 Lev. 161.

(*c*) A., the captain of a ship, finding that two of his crew had deserted, promised to divide their wages among the rest if they would work the vessel home. *Held*, that

this promise was without consideration, for the crew were bound to do so in any case. (*Stilk* v. *Myrick.*)

Camp. 317.

To suddenly find the ship shorthanded is all in the day's work, and is a contemplated risk. It would be otherwise if the ship proved unseaworthy, such a risk not being contemplated. (*Turner* v. *Owen.*)

8 F. & F. 176.

(*d*) A. is bound to pay B. £100 on 15th of March. On that day he brings £50, and B., in consideration of this payment, agrees to discharge him from the liability. *Held*, that there is no consideration for the discharge, as A. is doing less than he is bound to do. The discharge is valueless, and B. can afterwards sue for the balance. (*Pinnel's Case*, adopted in *Foakes* v. *Beer.*) But if A. pay a lesser sum either *before the day* or at *another place* than is limited by the condition, and B. *receive it*, this is a good satisfaction. So also if A. give in satisfaction something different in kind and B. receive it, as a hat, or a negotiable instrument for a lesser sum, such as a promissory note (*Sibree* v. *Tripp*) or a cheque. (*Goddard* v. *O'Brien.*) The result is rather odd, that a payment of £90 in gold is not a consideration for a discharge, but a cheque for £50 is, or seemingly a Bank of England note, this being a negotiable instrument. (See *Richards* v. *Bank of England.*)

5 Rep. 117 a.
9 Ap. Cas. 695.
Co. Litt. 212 b.
15 M. & W. 23.
9 Q. B. D. 37.
The Times, March 6th, 1901.

Note that a composition with creditors, apart from the Bankruptcy Act, is upheld on the ground that if A. is indebted to B., C., D., E., and F., all may agree to accept a payment of, say, 2*s.* 6*d.* in the pound, the consideration for each creditor's forbearance being the forbearance of all the others. (*Good* v. *Cheesman.*)

2 B. & Ad. 328.

(*e*) A. promised to marry B.: his uncle promised in writing that if he married B., he would allow him an annuity of £150 a year. *Held*, that there was a consideration for this promise. (*Shadwell* v. *Shadwell.*) Though A. was under contract to B., to marry her, he was under no obligation to his uncle or any one else, nor was he under

9 C. B. N. S. 159.

a public duty to do so. It was quite open to A. and B. to rescind the agreement to marry, perhaps because of want of means, a difficulty which the uncle's offer might overcome.

(*f*) If A. when assaulted in the streets promises a policeman £5 if he will come to his assistance, there is no consideration, for that is the policeman's duty.

As contrasted with cases where the considerations are settled by words spoken or written, it may be that where the Court is invited to infer contract from conduct, it is not clear whether any particular acts of A. were intended as the consideration for the conduct of B. **This is not a question of law at all,** but of pure fact as to the intention of the parties, and will be settled by a jury from a review of the surrounding circumstances.

Illustration.

B.'s father owed A. money: B. gave A. a promissory note for the same amount, bearing interest at 5 per cent. A. did not sue B.'s father. The father died, and A. sued B. on the note. It was a mere question of fact whether B. gave the note to A. in consideration of his letting his father alone. The jury found as a fact that this was the true inference from the conduct of the parties. (*Crears* v. *Hunter.*) 19 Q. B. D. 341

CHAPTER IV

CONTRACTS IN WRITING AND THE NOTE OR MEMORANDUM

SIMPLE or parol contracts require the presence of consideration. **In addition,** however, some must be reduced to writing; some must be in writing, **or** there must be a note or memorandum in writing (cf. the Statute of Frauds); in some there must be a note or memorandum or a statutory equivalent (cf. the Sale of Goods Act).

Some must be in writing, as—

45 & 46 Vict. c. 61.
i. Bills of exchange and promissory notes, and acceptance of bills;

30 Vict. c. 33.
ii. Contracts of marine insurance;

9 Geo. IV. c. 14, and 19 & 20 Vict. c. 97.
iii. Assignments of copyright;

iv. Acknowledgments of debts barred by the Statute of Limitations.

Some must be in writing, **or** there must be a note or memorandum of the contract.

29 Car. II. c. 3, § 4.
The Statute of Frauds, in its 4th section, provides that:—

'No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to

charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.'

There are thus five sorts of contract which come within the mischief of the section.

i. A promise by executor or administrator to answer damages out of his own estate.

The executor or administrator of a deceased person, as such is liable to discharge the liabilities of the testator or intestate, only to the extent of the assets which come to his hands. He is not bound to pay money from his own pocket. But he may make a special promise to pay, not as executor, but out of his own estate. Such a promise must satisfy the ordinary conditions of a binding contract (for instance, there must be consideration for the promise, e.g. a forbearance on the part of a creditor of the deceased or legatee to sue the executor) and the requirements of the statute. (*Rann* v. *Hughes.*) 7 T. R. 350.

ii. A promise to answer for the debt, default, or miscarriage of another person.

This is what is known as a contract of guarantee. The simplest form in which it arises is when A. promises B. that if C. does not pay B. £5 that C. owes B., then A. will pay B. This is the debt of C., the 'other person', and the bill in the first instance is sent to C. If C. does not pay, B. has another string to his bow, and can call upon A.

But if A. promises to pay B., if B. lends money to C., or supplies C. with goods or does C. a service, saying, 'Look to me for payment', or, 'Send the bill to me', this is not C.'s debt, but A.'s, and the bill will be sent to A., and to A. alone. It is an ordinary contract between A. and B., an 'original' contract as opposed to a 'collateral' contract. To such an original contract the name 'indemnity' has been not very happily applied.[1]

These cases are clear, but where expressions are used of an ambiguous kind, then it becomes

[1] A guarantee can only be given to the creditor, to the person who is or may be entitled, and is purely contractual; an indemnity, which is a promise to see a person harmless, may be given to the person who is or may be under a liability. In the strictest sense it can be given only to such a person, and has no necessary connection with contract. But the word has been loosely used. In *Harburg India Rubber Comb Co.* v. *Martin*, Vaughan Williams, L.J., said, 'In one sense all guarantees are contracts of indemnity', and again, 'A contract of indemnity, by which, I suppose, is meant a new contract in the nature of an original obligation.'

1902, 1 K. B. at pp. 583–4.

a question of fact for the jury to say what was the intention of the parties. (See *Keate* v. *Temple*.) 1 B. & P. 158.

There are other contracts of guarantee besides those mentioned in the statute, but it is only to those mentioned that the statute applies. There are many contracts in which some larger matter is the real object, *e.g.* the purchase of, or clearing off incumbrances from, property, the introduction of business into a stockbroker's office, or business where a *del credere* agent is employed, where the obligation to pay the debt of another is merely an incident. The mere fact that incidentally the debt of another person will be paid does not bring the case within the section. (Per Vaughan Williams, L.J., in *Harburg India Rubber Comb Co.* v. *Martin*.) 1902, 1 K. B. 778 (C. A.).

It would seem therefore that the real object of the contract must be *payment of the debt of another*.

The terms 'default' or 'miscarriage' comprehend wrongful acts creating a liability for damages which are not breaches of contract.

The undertaking to be within the statute must be given to **the creditor.** If A. promises B. to pay a debt which B. owes to C., this is not a guarantee, and need not be in writing. (*Eastwood* v. *Kenyon*.) 11 Ad. & E. 438.

For a guarantee to be binding on the guarantor, it must be accepted by the offeree. (*Mozley* v. 1 C. M. & R. 692.

1 M. & S. 557. *Tinkler* and *McIver* v. *Richardson*.) The promise to be within the statute must be actionable at
1893, 1 Ch. 97. common law. (See *In re Hoyle*.)

Illustrations.

(*a*) A. requests B. to lend C. a horse. B. does so on A.'s verbal undertaking that the horse shall be returned. The horse was not returned. *Held*, that the undertaking
6 Mod. 248. should have been in writing. (*Burkmyr* v. *Darnell*.) C. here was primarily liable in contract.

(*b*) C. takes B.'s horse without his leave and injures it. A. then promises B. to pay the damage if B. will not sue
2 B. & Ald. 613. C. *Held*, A.'s promise must be in writing. (*Kirkham* v. *Marter*.) C. here was primarily liable in tort for his 'miscarriage'.

(*c*) A., who has bought goods from B. who has bought from C., promises to pay C. the money which B. owes in order to get rid of C.'s lien, and so obtain possession of the goods sold, for C., till paid, will not part with the
7 C. B, N. S. 374. goods. This is not within the statute. (*Fitzgerald* v. *Dressler*.)

(*d*) The engagement of a *del credere* agent by which he guarantees the performance of contracts made for his principal is not within the statute, though it may result in
8 Ex. 40. payment of the debt of another. (*Couturier* v. *Hastie*.)

iii. An agreement made in consideration of marriage.

This does not mean a promise to marry, but a promise to pay money or settle property in consideration of a marriage taking place, as in *Shad-*
9 C. B. N. S. 159. *well* v. *Shadwell*. (*Vide supra*, p. 28.)

iv. A contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them.

We are not concerned here with the proper methods of selling or conveying land, tenements, or hereditaments; that is part of Real Property Law. The difficulty in this section has been to say what are 'interests in or concerning lands'. Probably any agreement that substantially touches rights in land is within the section. The following have been held within the section: an agreement for a person to take water from a well (*Tyler* v. *Bennett*); to convey an equity of redemption (*Massey* v. *Johnson*); a grant of a right to shoot over land, and to take away part of the game killed. (*Webber* v. *Lee.*) So, also, a contract for the sale of debentures charged on a man's property, which included land. The fact that the security was a 'floating security' made no difference. (*Driver* v. *Broad.*)

1 Ex. 255.

9 Q. B. D. 15.

1893, 1 Q. B. 539, 744.

One great difficulty has been removed by the Sale of Goods Act, viz. whether growing crops, grass, trees or fruits were 'interests in lands' under the 4th section, or 'goods' under the now repealed 17th section of the Statute of Frauds.

56 & 57 Vict. c. 71.

The Sale of Goods Act, in section 62, enacts that the term 'goods' includes 'emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.'

v. Agreements not to be performed within the space of one year from the making thereof.

This means agreements which **from their terms** are incapable of being completely performed within the year. The statute does not apply to those contracts which may be performed on one side within the year though they cannot be performed on the other in that time.

Illustrations.

(*a*) A. verbally promised B. that if B. would give him a guinea now, he would give him 1000 guineas on his wedding day. B. agreed, and paid over his guinea. Two years after B. married and claimed the 1000 guineas. A pleaded the statute, but it was held that there was nothing in the agreement to prevent B. from marrying next day. Judgment for B. (*Peter* v. *Compton*.) The judgment might have proceeded on the ground that B.'s part, viz. the payment of the guinea, was performed then and there. (See *Donellan* v. *Read*.)

Skinn. 353.

3 B. & Ad. 899.

(*b*) A contract to serve for one year, the service to commence on the day after the contract is made, 'is not within the Statute, for the day of making the contract does not count.' (*Smith* v. *Gold Coast Ashanti Explorers*.)

1903, 1 K. B. 285, and 538 (C.A.).

(*c*) A. engages a person for a year beginning next Monday week. That cannot be performed within a year from the making, and writing is required. (*Bracegirdle* v. *Heald*.)

1 B. & Ald. 722.

The preamble to the statute states that the Act is designed to prevent perjuries and subornation of perjuries, *i.e.* it is concerned with the

evidence to be offered in Court on the five specified contracts. It points out the evidence that is required, and states, that in its absence these contracts will not be enforced. They may be perfectly good contracts, but the absence of the required sort of evidence is like the absence of an essential witness at the trial. The action breaks down.

It is often said that the statute requires these specified contracts to be in writing. It does not; it is satisfied if there is a note or memorandum in writing signed by the party to be charged, or his agent. The difference between a written contract and a memorandum is material.

If the parties reduce their contract to writing and sign it, this document is the contract, and is subject to peculiar rules of evidence. *Inf.* p. 154.

The note or memorandum is not the contract. The parties are bound by the contract, and not by the memorandum, which is merely a note of what has taken place. Thus the Statute of Limitations runs from the time of making the contract, and not the memorandum.

The contract must be known to both parties, and binds both. The memorandum may be known to one only, as when one party writes a note to a third person (*Gibson* v. *Holland*), and binds only the party who has signed it. L. R. 1 C. P. 1.

A written contract must be made at the time of the agreement, the memorandum can be made

at any time except after the action is brought. (*Lucas* v. *Dixon.*)

22 Q. B. D. 357.

A repudiation of a contract cannot be a contract, but it may be a memorandum.

Illustration.

A defendant wrote, 'The only parcel of goods selected for ready money was the chimney glasses, amounting to £38 10*s.* 6*d.*, which goods I have never received and have long since declined to have for reasons made known to you at the time; with regard to the rest I am ready to pay.' *Held*, that this constituted an admission of the bargain, and included all the substantial terms, and was a sufficient note or memorandum within the statute. (*Baily* v. *Sweeting.*)

9 C. B. N. S. 857.

You may impugn the accuracy of the memorandum by showing that it is not a true account of what the agreement really was, but this cannot be done with a written contract.

The Nature of the Memorandum.

It must show the terms of the contract made, the consideration, and the parties, and be signed by the party to be charged, or his authorised agent.

'No document can be an agreement or memorandum of one which does not show on its face who the parties making the agreement are' (*Williams* v. *Lake*), either by name or by description. (*Carr* v. *Lynch.*)

2 E. & E. 349.

1900, 1 Ch. 613.

The subject-matter of the contract, if such there is, must be shown with sufficient certainty for

identification by the Court. (*Rose* v. *Cunyng-hame.*) 11 Ves. 550.

By the Mercantile Law Amendment Act, 1856, it is enacted that no promise *to answer for the debt, default, or miscarriage of another person* which satisfies the requirements of the statute as to writing and signature, shall be deemed invalid to support an action 'by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document.' In this class of contract the consideration need not appear in the memorandum. **It must exist,** and it may be proved by verbal evidence. 19 & 20 Vict. c. 97, § 3.

The 'signature' of the party to be charged, or his agent, may be printed or stamped (*Saunderson* v. *Jackson*) at the beginning, middle or end of the document. (Cf. *Evans* v. *Hoare.*) It must be intended as a signature, recognising the contract; initials are sufficient. 2 B. & P. 238. 1892, 1 Q. B. 593.

The memorandum need not be one document, it may be more, but if so, the various papers must, when placed together, by themselves show the contract without extrinsic parol evidence to assist. They must speak for themselves and practically form one document.

Illustrations.

(*a*) A. agreed to take a series of Shakespear engravings, to be issued over a number of years. The publishers

had sent a prospectus out, which A. had seen, and had placed in their shop a book labelled 'Shakespear subscribers, their signatures', which A. had signed. In an action by the publishers against A. for breach, *held* that as the prospectus could not be connected with the subscribers' book without parol evidence, there was no sufficient memorandum. (*Boydell* v. *Drummond.*)

11 East, 142.

(*b*) But parol evidence may be given to show that a letter was contained in a certain envelope, and then they form one document, and the envelope thus supplies the name of the other party to the contract. (*Pearce* v. *Gardner.*)

1897, 1 Q. B. 688. (C. A.)

To the rule as to the inadmissibility of parol evidence in cases falling under the statute, an exception has been established by the Court of Chancery. The **'equitable doctrine of part performance'** has been applied to those contracts which concern interests in lands where *possession of the land contracted for has been in fact delivered and accepted under the contract.* In such a case the Court will admit evidence of the contract without regard to the statute in order to carry out the terms on which possession was given. 'The ground of the doctrine in equity is that if the Court found a man in occupation of land, or doing such acts with regard to it as would *primâ facie* make him liable at law to an action of trespass, the Court would hold that was strong evidence that a contract existed.' (Per Cotton, L.J., in *Britain* v. *Rossiter.*) The possession of the land of another is presumed not to be wrongful, but by agreement. 'The acknowledged possession of a stranger in

11 Q. B. D. 131.

the land of another is not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorise an inquiry into the terms.' (Per Sir T. Plumer, M.R., in *Morphett* v. *Jones*, quoted with approval by Selborne, L.C., in *Maddison* v. *Alderson*.) 'I have found no case in which there has not been a change in the possession of the land, or, where the purchaser was already a tenant in possession, a change in the nature of his tenure, which was held equivalent to a change in the possession. The effect is to construe the 4th section of the Statute of Frauds as if it contained these words, "*or unless possession of the land shall be given and accepted*".' (Per Lord Blackburn in *Maddison* v. *Alderson*, at p. 489.) So possession taken before a parol contract for a lease, and subsequently continued, if unequivocally referable to the contract, may constitute an act of part performance. (*Hodson* v. *Heuland*.)

1 Sw. 181.

L. R. 8 Ap. Cas. 479.

1896, 2 Ch. 428.

Payment of the purchase-money in part or in full is not such part performance, for payment of money is an equivocal act, not in itself, until the connection is established by parol testimony, indicative of a contract concerning land. An act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract is not in general admitted to constitute an act of part performance taking the case out of

the Statute of Frauds. (Per Lord Selborne in *Maddison* v. *Alderson*.)

Accordingly, this equitable doctrine is applicable to contracts relating to interests in lands, alone of the contracts mentioned in the 4th section of the Statute of Frauds. (*Britain* v. *Rossiter*.) It has been specifically held not to apply to a contract of service not to be performed within the year, which is not taken out of the statute by services rendered under it (*Britain* v. *Rossiter*); nor to a contract in consideration of marriage, though the marriage has taken place (*Caton* v. *Caton*); nor to a contract to answer for the debt of another, though the party guaranteed has given credit. (*Wain* v. *Warlters*.)

L. R. 1 Ch. 137.

5 East, 10.

35 Ch. D. 697. In *McManus* v. *Cooke*, Kay, J., suggested that the doctrine of part performance probably applied to all cases where a Court of Equity would have granted a decree of specific performance if the alleged contract had been in writing. But the opinion of a single judge, however eminent, must be received with caution in the face of the dicta of the Court of Appeal and the House of Lords.

The acts of part performance relied on must be unequivocally referable to the agreement alleged.

Illustrations.

(*a*) Foxcroft, owning land in fee simple, agreed with Lester verbally that if Lester should clear the land of buildings, and put up fresh houses, he would give him

a long lease. There was no memorandum. Lester entered, and pulled down and built at great expense ; he acted as proprietor, let the houses and received the rents with Foxcroft's acquiescence. Foxcroft being seized with a fatal illness devised his fee simple to his sons, and directed the preparation of a lease in accordance with the verbal arrangement. He approved the draft, but died before he executed it. The Court directed the sons to execute the lease as approved by their father. (*Lester* v. *Foxcroft.*) Colles P. C. 108.

(*b*) A., a woman, had been induced by an old farmer to stay in his service as housekeeper without wages on the faith of his verbal promise to leave her by will a life estate in the farm. It was *held* that these services might have been given for other reasons, and so were not unequivocally referable to the contract. (*Maddison* v. *Alderson.*) 8 Ap. Cas. 467.

The absence of the necessary writing makes the contract unenforceable, but not void. Thus, A. might bring an action against B. and discontinue, not having the proper evidence; afterwards B. might make a memorandum which, if A. got hold of it, would give him victory in a fresh action.

Illustration.

A. and B. made a contract in France which was not to be performed within the space of a year. French law does not require any writing. A. brought an action on it in England, and argued that as an English contract it was void, but that it was a good French contract and as such should be given effect to by the courts of this country. B. argued that it was a perfectly good English contract, but was unenforceable owing to the unfortunate lack of the

statutory evidence. *Held*, that B.'s view was correct, and
12 C. B. 801. judgment accordingly. (*Leroux* v. *Brown*.)

56 & 57 Vict. c. 71. Section 4 of the Sale of Goods Act, 1893, which replaces the now repealed 17th section of the Statute of Frauds, provides as follows :—

'(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

'(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

'(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.'

Under section 62.

'"Goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.'

Whether any particular contract is one for the

sale of goods, or for work and labour, is important and often difficult to decide. The statute applies if the former, and not if the latter. Thus a contract for contriving a machine for a certain purpose (*Grafton* v. *Armitage*), a contract with a printer to print a book (*Clay* v. *Yates*), are contracts for work and labour. On the other hand, a contract for the manufacture and delivery of a machine (*Atkinson* v. *Bell*), a contract to make a set of false teeth (*Lee* v. *Griffin*), are contracts for the sale of goods. The circumstances must be considered in each case.

2 C. B. 336.
1 H & N. 73.
8 B. & C. 277.
1 B. & S. 272.

If no price is fixed, whether the goods are of the 'value' of £10 is a question of fact. (*Harman* v. *Reeve*.)

18 C. B. 587.

A contract for the sale of several articles, the value of which collectively is above £10, though the value of each article is less than £10, is within the statute. (*Baldey* v. *Parker*.) Whether a sale of several articles at the same time makes one contract or several is a question of fact depending on the circumstances: *e.g.* a purchase of various things in a shop at one time is presumably one contract (*Baldey* v. *Parker*), while at an auction each lot sold is a separate contract. (*Emmerson* v. *Heelis*.)

2 B. & C. 37.
2 Taunt. 38.

To satisfy the statute, there must either be **(1) an acceptance and actual receipt of part of the goods by the buyer, or (2) something given in earnest or part payment, or (3) a note or memorandum.**

'**Acceptance.**'—This acceptance is different from 'acceptance in performance'. It is any act in relation to the goods which recognises any pre-existing contract of sale, *i.e.* it is evidentiary as admitting that the goods are delivered under a contract which justifies such a dealing with them, *e.g.* an examination by the buyer of goods delivered **to see whether they satisfy the contract** (*Abbott* v. *Wolsey*), or an attempt by a buyer to resell to a third person. (*Taylor* v. *G. E. Ry. Co.*)

1895, 2 Q. B. 97, C. A.

1901, 1 Q. B. at p. 778.

Such conduct is strong evidence that the person so dealing had contracted to buy the goods; in other words, that a contract exists, whatever the terms of the contract are.

'Actual receipt' requires delivery and taking possession as a fact, but the delivery and receipt may be constructive and satisfy the statute, though there occur no actual change in possession.

Illustration.

A. bought a horse of B., and asked him to keep it at livery. B. assented, and moved the horse from his sale stable to his livery stable. *Held*, that B. from that time held the horse, not as owner, but as any other livery-stable keeper might, and that there was an effectual change in possession. (*Elmore* v. *Stone.*)

1 Taunt. 458.

If after examination of the goods, or other such dealing as mentioned above, the buyer refuses to take the goods, *i.e.* to accept in performance, he may be sued for such nonacceptance. Whether

he is justified depends on the terms of the contract, which may then be proved by parol evidence.

'**Earnest or part payment**' are said not to be the same, but 'earnest' may avail as part payment. 'Earnest' is forfeited if the party fails to perform the contract, and is presumptively brought into account as payment if he performs it. (Cf. per Fry, L.J., in *Howe* v. *Smith.*) Drawing a shilling across the seller's hand does not satisfy the statute, which says 'give'. (*Blenkinsop* v. *Clayton.*)

27 Ch. D. 102.

7 Taunt. 597.

The **note or memorandum** must satisfy the same requirements as those of the 4th section of the Statute of Frauds, with this exception, that the memorandum of the sale of goods need not show the price unless it has been fixed by the parties, when it must appear. In the absence of express agreement, if the price is not mentioned, a reasonable price is imported. (*Elmore* v. *Kingscote.*)

5 B. & C. 583.

It may be noticed that the same person may be authorised to act as agent to sign for both the contracting parties, either expressly or presumptively, by the general character of his agency. Thus, an auctioneer, by the general usage of public auctions, is agent for both parties to sign a memorandum, so also an entry of a contract in the broker's own book is enough to satisfy the statute.

An enactment which, like the Statute of Frauds, makes a contract 'unenforceable', affects the remedy for a breach of the contract, and not the validity of the contract itself, and thus forms part of the *lex fori*, in other words of the procedural rules of the court where the action is tried. (See *Leroux* v. *Brown*, *ante*.)

Though an action will fail if brought upon an agreement otherwise good to which the Statute of Frauds is successfully pleaded, if the defendant does not choose to use this defence the action will succeed. The Statute does not make the agreement a nullity. All acts done in pursuance of it may be referred to it for their legal validity. Money actually paid under such an agreement cannot be recovered as long as the other party is ready and willing to execute the contract and there is no failure of consideration for the payment. And an express contract within the statute, though not actionable, serves to prevent any different contract being charged respecting the same matter.

Illustrations.

(*a*) A. contracts verbally to buy a plot of land from B. and pays a deposit. He cannot repudiate and get the deposit back merely because there was no written evidence of the contract. (*Thomas* v. *Brown*.)

1 Q. B. D. 714.

(*b*) A. verbally contracts with B. for the sale of a growing crop of grass to be taken by him. He enters upon the land to take it. B. sues him for trespass. A.

can plead his verbal agreement, which operates as a licence to enter. (*Carrington* v. *Roots*, per Lord Abinger.) 2 M & W. 248.

(*c*) The plaintiff agreed with X. to buy Spanish bonds for X. for delivery at a future day, and paid the purchase money. The contract note was not duly signed. The plaintiff then sued X. for the amount so paid as being paid to the use of X. Judgment for the plaintiff. (*Pawle* v. *Gunn.*) 4 Bing. N. C. 445.

It would seem that if specific goods are sold without the statute being satisfied, the property in the goods passes to the buyer. He cannot, however, be sued for the price, but if he declines to pay, the seller may treat the contract as rescinded. The rescission revests the property. (Per Bigham, J., in *Taylor* v. *G. E. Ry. Co.*) 1901, 1 K. B. 774.

CHAPTER V

CAPACITY

FOREIGN STATES, sovereigns and their representatives, their suite and domestics, and British subjects accredited to Great Britain by a foreign State, are exempt from the jurisdiction of the Courts of this country unless they expressly submit to the jurisdiction. They can sue but not be sued. But the domestics' privilege is lost by trading.

Illustrations.

(*a*) A., an Oriental potentate, while in this country, engaged himself to be married under the assumed name of Mr. Smith. *Held*, that as he had not submitted to the jurisdiction in the face of the Court, the Court had no jurisdiction. (*Mighell* v. *Sultan of Johore.*)

1894, 1 Q. B. 149, C. A.

For the extent of such submission, see *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord.*

1898, 1 Ch. 190.

(*b*) A British subject appointed by a foreign Government as secretary of legation, and received as such without conditions by our Government, is exempt from the jurisdiction of our Courts. (*Macartney* v. *Garbutt.*)

24 Q. B. D. 368.

Alien enemies cannot, without a licence from

the Crown, make a contract or bring an action on a contract while war is proceeding; but their rights which were in existence prior to the war are only suspended during hostilities, and can be sued on when the war is ended, if the Statute of Limitations has not meantime run.

Persons convicted of treason or felony cannot contract till they have served their sentence, are out 'on license', or have received a free pardon.

Barristers cannot sue for their fees; medical men may, if registered, but a College of Physicians may prohibit by by-law its Fellows from so doing; as the Royal College of Physicians, London, has done. 49 & 50 Vict. c. 48, § 6.

Infants

An infant is a human being under twenty-one years of age. A person ceases to be an infant when he has reached the last day of his twenty-first year.

As a general rule, at Common Law the contracts of an infant were voidable. But this general rule has been almost eaten away by exceptions, and the law now is as follows:—

A. Some contracts are void.

Two statutes must here be considered together, the Infants Relief Act, 1874, and the Sale of Goods Act, 1893. 37 & 38 Vict. c. 62. 56 & 57 Vict. c. 71.

The Infants Relief Act was as follows:—

'All contracts, whether by specialty or simple contract,

henceforth entered into by infants for the *repayment of money lent or to be lent*, or for *goods supplied or to be supplied* (other than contracts for necessaries), and all *accounts stated*, with infants shall be absolutely *void:* Provided always, that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of the common law or equity, enter, except such as now by law are voidable.

'2 No action shall be brought to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.'

The Sale of Goods Act, by section 2, provides:—

'That where necessaries are sold *and delivered* to an infant . . . he must pay a reasonable price therefor.'

'Necessaries in this section means goods suitable to the condition in life of such infant . . . and to his actual requirements at the time of the sale *and delivery*.'

The first section of the Infants Relief Act makes three sorts of contract absolutely void. Other contracts are left as they were. An 'account stated' is the admission of a balance due from one party to another. Such admission implies a promise in law to pay it.

Illustration.

A building society advanced on behalf of an infant the purchase-money for an estate, and subsequently took a

mortgage from the infant for advances to be made for building. *Held*, that though an infant might legally be a member of a building society registered under the Building Societies Act, 1874, he could not execute a valid mortgage to secure advances, and that though the society stood in the shoes of the vendor and had a lien for the purchase-money and expenses, and interest at 4 per cent., the mortgage was void under the Infants Relief Act. (*Nottingham Permanent Building Society* v. *Thurstan.*) 1903, A. C. 6.

The section, however, makes an exception in favour of goods which are 'necessaries.' This exception is destroyed by the section above quoted of the Sale of Goods Act, the result being that the infant is no longer liable at all on a *contract* for the sale of goods even though they are necessaries; but where there is a contract for the sale of goods which are necessaries, *and these are delivered to the infant*, he is bound not by the contract but by statute *quasi ex contractu* to pay a reasonable price therefor.[1]

The rule that where necessaries are supplied to a person who from any disability cannot himself contract, the law implies an obligation to pay for them out of his property, extends to the case of an infant pauper supported by guardians of the poor.

Illustration.

The guardians took charge of an infant in 1897. In 1903 the infant's grandfather died and left him two or

[1] See an article by Mr. Cohen, K.C., *L. Q. R.*, April, 1903.

three hundred pounds. The executors were directed to pay the arrears of maintenance, and 5*s.* a week for his future support. (*In re Clabbon.*)

1904, 2 Ch. 465.

In determining what are necessaries in any particular case there is a preliminary question for the Court whether, considering the surrounding circumstances, the condition in life of the infant or his special position, there is any reasonable evidence of the article in question being necessary. If the Court answers affirmatively, it is for the jury to say whether in fact the article is necessary. In such a case the onus lies on the plaintiff to prove (i) that they are suitable for his condition in life, (ii) that he was not sufficiently supplied at the time of sale and delivery. (*Nash* v. *Inman.*)

1908, 2 K. B. 1. (C. A.)

Illustration.

A., an infant, is sued by B. for the price of goods sold on credit. He may, to show that they were not necessaries, give evidence that at the time of the order he was already sufficiently supplied, and it is immaterial whether or no B. knew of this. (*Barnes* v. *Toye, Johnstone* v. *Marks.*)

13 Q. B. D. 410.
19 Q. B. D. 509.

The second section of the Infants Relief Act deprives the infant of any power of ratification as against himself after he comes of age. No contract which is not valid before he comes of age can be made valid afterwards so as to bind him.

In promises of marriage, there must be a new promise after majority, and not a ratification. For

opinions as to the fine distinction between a new promise to marry and a ratification, see *Ditcham* v. *Worral.* 5 C. P. D. 410.

Illustration.

K., an infant, became indebted to a firm of brokers for £547, and when he came of age the firm sued him. He compromised by giving bills of exchange for a smaller sum. The bills were indorsed to the plaintiff, who sued on them. *Held*, that here was a promise to pay based on a new consideration, an instance of the ratification aimed at by the Act, and that so the plaintiff could not recover. (*Smith* v. *King.*) 1892, 2 Q. B. 543.

As an infant is liable in tort, attempts have been made to make him pay damages on a claim framed as for a tort when the cause of action is substantially founded on a contract. This the Courts have declined to allow.

Illustration.

A., an infant, hired a horse for riding, and damaged it by reckless riding; the job master sued him in tort for negligence. *Held*, that as the infant's conduct was really a breach of contract, the plaintiff could not succeed. (*Jennings* v. *Rundall.*) 8 T. R. 335.

But if the claim is substantially founded on a tort, though connected with or arising out of a contract, the infant is liable.

Illustration.

A., an infant, hired a horse for riding and not for jumping, then lent it to a friend, who jumped it and

killed it. *Held*, he was liable, for this 'was not an abuse of the contract', but a thing that the owner had expressly forbidden him to do. (*Burnard* v. *Haggis*.)

14 C. B. N. S. 45.

B. Some contracts are valid and binding :—

Co. Litt. 79 *a*.

(i.) The infant can contract a valid marriage.

(ii.) He is, it seems, liable for the repayment of money lent to him for the purchase of necessaries and so expended. (*Marlow* v. *Pitfield*, *Lewis*, v. *Alleyne*.)

1 P. W. 558. 1888, 4 Times L. R. 560, C. A.

(iii.) He is liable on contracts which, taken *as a whole*, are in the opinion of the Court for his benefit. This class chiefly consists of contracts concerning the infant's education, employment, and medical attendance.

'An infant may bind himself to pay for his good teaching and instruction whereby he may profit himself afterwards;' he is 'liable for such necessary instruction duly provided at a reasonable charge.' (*Walter* v. *Everard*.)

Co. Litt. 172 *a*.

1891, 2 Q. B. D. 369, C. A.

Contracts of apprenticeship and with regard to labour are not contracts to an action on which the plea of infancy is a complete defence, and the question has always been, both at law and in equity, whether the contract when carefully examined in all its terms is for the benefit of the infant. If it is so, the Court will not allow the infant to repudiate it, even though some of its terms may not be advantageous to him. (*Clements* v. *L. & N. W. Ry.*, per Kay, L.J.)

1894, 2 Q. B. 482, C. A.

A contract of employment which is beneficial by securing the infant permanent work and the means of maintaining himself, if the conditions are not unreasonable or unusual and the wages not unreasonably low, will bind the infant. (*Leslie* v. *Fitzpatrick.*) 3 Q. B. D. 229.

But a contract of apprenticeship, or instruction containing extraordinary and unusual stipulations, which place inordinate power in the hands of the master without correlative obligation on him, may be held to be not for the benefit of the infant. (*De Francesco* v. *Barnum.*) 45 Ch. D. 430.

Illustrations.

(*a*) A., an infant, entered into a contract of service by which he got employment, coupled with a promise on his part that he would not compete in business with his master for two years after his service ceased. *Held,* that this was beneficial to the infant, and bound him. (*Evans* v. *Ware.*) An infant's contract of service is not necessarily invalid because it contains some stipulations which are void as being in restraint of trade. If such stipulations are severable, they may be disregarded and the rest of the contract binds the infant, if for his benefit. (*Bromley* v. *Smith.*) 1892, 3 Ch. 502. 1909, 2 K. B. 235.

(*b*) A clause in an apprenticeship deed provided that the master need not pay wages to the infant apprentice during any lock-out of his workmen, but gave the apprentice liberty to get work elsewhere. *Held,* that this was so much to the detriment of the infant that the deed was not binding on him. (*Corn* v. *Matthews.*)[1] 1893, 1 Q. B. 310, C. A.

[1] *Apprenticeship deeds* may be shortly mentioned. By

C. Those contracts which are neither void nor valid, are voidable, *i.e.* the infant can either during

these agreements, which are usually in indentures, the master agrees to teach, the apprentice to learn. The agreement operates by imposing on the infant a legal status or relationship to the master, which is regulated by custom and statute. The infant is not bound by way of contract to serve, and he is not liable to an action for damages or to an injunction. For this reason the parent or other sureties join in the contract. The sureties are held liable for the gross misconduct of the apprentice.

In an ordinary deed of apprenticeship, in the absence of provision to the contrary, the covenants are independent, and the non-performance by the apprentice, though it may give a right of action to the master, will not discharge him from doing what he promised. But if the apprentice will not be taught, the master is not liable on the covenants. (*Raymond* v. *Minton*.) Sickness or accident incapacitating the apprentice does not discharge the master, he takes him for better for worse; but permanent illness does excuse, because the parties contemplated a continuance of ability. (*Boast* v. *Firth*.)

L. R. 1 Ex. 244.

L. R. 4 C. P. 1.

The same amount of misconduct which would justify a dismissal in ordinary service is not enough here, unless there be express provision to that effect. But if the misconduct is such as to make it impossible for the master to maintain, employ, or teach him, the master has a good defence to the action on the covenants. Thus, it is a good defence for the master to allege and prove that the apprentice was 'a habitual thief', and had in fact been convicted. (*Learoyd* v. *Brook*.) If, however, the infant had only been stealing sweetmeats from a jar, personal chastisement or confinement are the appropriate remedies.

1891, 1 Q. B. 431.

infancy or within a reasonable time after coming of age repudiate them. The privilege of avoidance belongs to the infant only.

Thus a contract of mutual promises to marry is voidable by an infant party; but he may sue the other party for a breach of promise. (*Holt* v. *Ward.*) 2 Str. 937.

So where an infant has paid money under a contract from which he has as yet received no benefit, he may repudiate and recover the money he has deposited. (*Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.*) 1894, 3 Ch. 589.

If, however, he has received part of the benefit, he cannot recover money paid under the contract, for the consideration has not entirely failed, though he can repudiate the contract and escape future liability. And this is so even where the contract is absolutely void under the Infants Relief Act.

An infant cannot during infancy avoid the apprenticeship; if he does so after majority, this does not discharge the sureties.

If the apprenticeship is oppressive on the infant it is void. (*Corn* v. *Matthews.*) 1893, 1 Q. B. 310, C. A.

If the fulfilment has been prevented otherwise than by the wrongful act of the master, he need not refund any premium. If the master dies during the currency of the indentures, the representatives need not refund any premium, for there has only been a partial failure of consideration. (*Whincup* v. *Hughes.*) L. R. 6 C. P. 79.

Illustration.

An infant hired a house and agreed to pay £100 for the furniture. He paid £60 down, and gave a promissory note for the balance. After using house and furniture for some time, he came of age and repudiated the contract. *Held*, that he could repudiate the contract of hire and the promissory note, but could not recover the money actually paid for the furniture, for he had been using it. (*Valentini* v. *Canali.*)

24 Q. B. D. 166.

An adult is liable on obligations incident to an interest in real estate or other permanent property or to a position or status acquired by him during infancy, unless he has during infancy, or within a *reasonable time after he attains full age*, repudiated such interest, position, or status. Thus, if an infant takes a lease of land and enters into possession, he becomes liable for the rent and other incidents of the estate, till he repudiates the lease; and by continuing in possession after full age he affirms the lease, and remains absolutely liable for the rent and covenants during the term. (*Kirton* v. *Elliott.*) So also if an infant enter a partnership and does not disaffirm it on coming of age, he becomes liable on contracts subsequently made by the firm. (*Goode* v. *Harrison.*) The same principle applies to shares in companies, and settlements, there being a continuing obligation.

2 Bulst. 69.

5 B. & Ald. 147.

Illustrations.

(*a*) A., a husband, five years after his majority, sought to set aside a marriage settlement which had been made

when he was an infant and to which he was a party. *Held*, that the settlement was in its nature voidable, but that the repudiation came too late. (*Edwards* v. *Carter*.) 1893, A. C. 360.

(*b*) A., an infant, sought to set aside a settlement made in 1857. Nothing had been received under the settlement till 1890. *Held*, that the repudiation was made in reasonable time, as there was no reason why the applicant should take steps until the settlement took effect. (*In re Jones, Farrington* v. *Forrester*.) 1893, 2 Ch. 461.

By the Betting and Loans (Infants) Act, 1892, amended by the Moneylenders Act, 1900, it is provided that persons sending documents for profit to an infant, inciting him to bet or borrow money, shall be guilty of a misdemeanour and liable to fine and imprisonment. If it is proved that the person to whom the document was sent was an infant, the person charged shall be deemed to have known that the person to whom the document was sent was an infant, unless he proves that he had reasonable ground for believing the infant to be of full age. If an infant who has contracted a loan void at law agrees after coming of age to pay, that agreement is void, and any negotiable instrument given by him, under such agreement to pay the loan, *is void absolutely against all persons whomsoever.* 55 Vict. c. 4. 62 & 64 Vict. c. 51, § 5.

Lunatics and Drunken Persons

Lunatics and drunken persons are on the same footing. A contract made by a lunatic or

a drunkard, if he is so incapable as not to know its effect, and his condition is known to the other party, can be repudiated by him but not by the other party. Such a contract is voidable only, and so can be enforced by the drunkard when he becomes sober.

Illustrations.

(*a*) A., a defendant, in an action of contract, sets up the defence that he was insane when the contract was made. He must, in order to succeed, show that at the time of the contract his insanity was known to the plaintiff. (*Imperial Loan Co.* v. *Stone.*

1892, 1 Q. B. 599, C. A.

(*b*) A. is plaintiff, B. the defendant. Statement of claim: Breach of contract in not completing purchase. Defence: Defendant was so drunk that he did not know what he was about. Reply: After defendant became sober he ratified. Judgment for plaintiff. (*Matthews* v. *Baxter.*)

L. R. Ex. 132.

'When necessaries are sold and delivered to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.'

'Necessaries mean goods suitable to the condition in life of such person and to his actual requirements at the time of the sale and delivery.' (Sale of Goods Act, 1893.)

55 & 57 Vict. c. 71, § 2.

The above section apparently refers to an occasion when the seller knows of the incapacity; then there is a liability *quasi ex contractu*, to pay a reasonable price.

Contracts made when the other party is in ignorance of the insanity and drunkenness are binding.

A marriage by a lunatic is void. (*Hancock* v. *Peatty*.) L. R. 1 P. D. 335.

Corporations

A corporation is an artificial person created by law, having a perpetual succession, a distinctive name, and a common seal.

Two rules apply to the formation of the contracts of a corporation. A corporation must contract (i.) by means of an agent, (ii.) under its seal.

To the second rule there are the following exceptions :—

(*a*) Where the acts done are of trifling importance, daily necessity, or of great emergency.

(*b*) Where work is done or services rendered at the request of the corporation, in respect of matters for the doing of which it was created, and the benefit of the work and services is accepted by the corporation, a contract to pay will be implied and the absence of a contract under seal is no answer to the action. (*Nicholson* v. *Bradfield Union*, and *Lawford* v. *Billericay Rural Council*.) L. R. 1 Q. B. 620. 1903, 1 K. B. 772, C. A.

So if a corporation contracts without a seal,

and does the whole of its part, it can sue on the
4 Bing. 75. contract. (*Mayor of Stafford* v. *Till.*)

(*c*) The rule does not apply to trading corporations, since the Exchequer Chamber has laid it down that when a company is incorporated for trading purposes it may make all such contracts as are directly connected with the purposes of its incorporation, irrespective of their magnitude, without seal. (*South of Ireland Colliery Co.* v. *Waddle.*) There are also some statutory exemptions, *e.g.* under 30 & 31 Vict. c. 131, § 37, in favour of corporations formed under the Companies Act, 1862, and the amending Acts.

L. R. 4 C. P. 617.

But if any Act, general or special, prescribes any special form such as sealing, the Act must be obeyed.

Thus by section 174 of the Public Health Act, 1875, 'every contract made by an *urban authority*, whereof the value or amount exceeds £50, shall be in writing and sealed with the common seal of such authority.' The effect of that is, that without the seal the contract is void, and that an *urban authority* may make a contract, reap the
30 W. R. 500. full benefit, and then decline to pay. (*Young* v. *Mayor of Leamington*, and *Hunt* v. *Wimbledon*
4 C. P. D. 48. *Local Board.*)

The contractual powers of corporations are affected by the doctrine of **ultra vires.** There are *two sorts of corporations*, the common law

and the statutory. The first originate in charter or grant, *e.g.* the old East India Company, or an Oxford College; the second in an Act of Parliament, and in this class the most important are the joint-stock companies formed under the Companies Acts.

A common law corporation can make any contract which it is not prohibited from making. Such prohibition may be expressed in the instrument creating it, or imposed by a subsequent Act of Parliament.

A statutory corporation can only make those contracts which it is permitted to make. A company incorporated under the Companies Acts is bound by the terms of its Memorandum of Association, and cannot go outside the objects mentioned therein (*Ashbury Carriage Co.* v. *Riche*), or what is fairly incidental to those objects. (*A.-G.* v. *G. E. Ry. Co.*) All such contracts as are made beyond its capacity are said to be 'ultra vires'.

See App. A.

L. R. 7 H. L. 653.

5 Ap. Cas. 473.

Illustration.

(*a*) A county council, being a purely statutory body, had statutory powers to own and work 'tramways' only. It started a line of omnibuses as well. *Held*, that the council was acting 'ultra vires' in becoming omnibus proprietors and running omnibuses as feeders to the tramways, this business not being by necessary implication incidental or ancillary to the tramway business. (*A.-G.* v. *London County Council.*)

1902, A. C. 165.

The Married Woman

At **Common Law** the husband and wife were regarded, in respect of property and rights of action, as one person. A married woman could not, as a rule, bind herself by contract, nor could she sue or be sued without joining her husband as a party to the action. There were some exceptions, *e.g.* if the husband was in penal servitude, or had not been heard of for seven years, or there had been a judicial separation or a separation order, she counted as a *feme sole.*

At **Common Law** marriage operated as a gift to the husband of all the wife's personal property in possession. If there was any outstanding right, this was a **chose in action,** and at Common Law had to be reduced into possession by the husband, *i.e.* he had to take some step extinguishing the wife's interest, or showing the **animus domini,** *e.g.* receiving the principal money. If she survived him, the unreduced choses in action were hers; if she died first, he could take out administration, and then took as her legal personal representative.

Per contra, the husband was liable for all antenuptial contracts and debts absolutely, but this liability ceased on her death, unless he took out administration.

The Property of the Married Woman

The Court of Chancery invented the 'separate estate' of a married woman, enabling her to hold property separate from her husband by means of a trustee who held the property settled 'to her separate use', and the married woman thus acquired in equity a capacity for contracting, by giving her creditor a remedy against her then disposable separate property.

The Court of Chancery also permitted a form of settlement of separate estate, by which the married woman was *restrained from anticipating* her income, *i.e.* charging it in advance.

These protections were set up as against the husband, and if the woman became discovert the restraint was removed, only to become again operative if she married.

This is *equitable* separate estate.

But since the Married Women's Property Act, 1882, the married woman can hold *statutory* separate estate without the interposition of a trustee. 45 & 46 Vict. c. 75.

'A married woman shall be capable of acquiring, hold- s. 1 (1).
ing, and disposing, by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee.'

'Every woman who marries after the commencement s. 2.
of this Act shall be entitled to have and to hold as her

separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, etc.'

s. 5. 'Every woman married before the commencement of this Act shall be entitled to have and to hold, and to dispose of in manner aforesaid as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, etc.'

Illustrations.

(*a*) A. dies in 1869, leaving an estate to his son B. for life, with remainder to his daughter C. C. marries in 1870; B. dies in 1901. The estate is not C.'s separate property, because though it fell into possession after January 1, 1883, the title to it accrued in 1869.

(*b*) Wearing apparel purchased by a married woman for her personal use with money supplied by her husband for that purpose is *primâ facie* her separate property, and in the absence of rebutting evidence cannot be claimed by her husband as against the wife's creditors. (*Masson*

1909, 2 K. B. C. A.) *Templier & Co.* v. *De Fries.*)

Antenuptial Debts

s. 13. 'A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted and all contracts entered into or wrongs committed by her before her marriage, . . . and she may be sued for any such debt and for any liability in damages or otherwise, . . . and all sums recovered

against her . . . or any costs shall be payable out of her separate property. . . .'

As a married woman's liability on an antenuptial contract is not affected by the M. W. P. Act, 1882, this liability is personal, and she can be committed to prison for non-payment under the Debtors Act, 1869. (*Robinson* v. *Lynes*, and *Birmingham Excelsior Money Society* v. *Lane*.) 1894, 2 Q. B. 577. 1904, 1 K. B. 35.

'A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her before marriage . . . to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife.' s. 14.

If the husband has assets, he can be sued separately. Both husband and wife can be sued jointly, but if he has no assets, he gets the costs of his defence.[1]

The Contracts of the Married Woman made during Cohabitation

The Married Women's Property Acts, 1882 *and* 1893.

'A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of M. W. P. Act, 1882, s. 1, sub-s. 2.

[1] The Married Women's Property Act, 1870, released the husband from all antenuptial liabilities if the marriage took place on or after August 9, 1870. The Married Women's Property Act, 1874, if the marriage took place on or after July 31, 1874, made the husband liable, so far as the assets he had or ought to have received with his wife. 33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise in all respects as though she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, . . . and any damages or costs recovered by her . . . shall be her separate property; and any damages or costs recovered against her . . . shall be payable out of her separate property, and not otherwise.'

Her contracts bind her separate property, and not herself personally, and she cannot be committed to prison under the Debtors Act, 1869. (*Scott* v. *Morley*.)

20 Q. B. D. 20.

M. W. P. Act, 1893, 56 & 57 Vict. c. 63.

'1. Every contract hereafter entered into by a married woman, *otherwise than as agent*—

'(*a*) Shall be deemed to be a contract entered into by her with respect to, and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time she enters into such contract.[1]

'(*b*) Shall bind all separate property which she may at that time or thereafter be possessed of or entitled to.

'(*c*) Shall also be enforceable by process of law against

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[1] The 1893 Act cures some defects in the Act of 1882, under which it was held necessary that the married woman should have some separate property at the time she made the contract, if the contract was to bind any separate property she acquired afterwards. Under the old Act, moreover, it was always a question of fact, whether, though she had separate property, she intended to bind it. That intention is under the new Act presumed.

all property which she may thereafter, while discovert, be possessed or entitled to.

'Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract, any separate property which at that time or thereafter she is restrained from anticipating.'

The question whether a married woman contracts 'otherwise than as agent', is one of pure fact. Had she her husband's authority express or implied? The knowledge of the person with whom she contracts on this point is immaterial. (*Paquin* v. *Beauclerk.*) 1906, A. C. 148.

If the married woman is restrained from anticipation, only the income which has actually accrued due at the date of the judgment against her can be taken in execution. (*Hood Barrs* v. *Heriot*; *Whiteley* v. *Edwards*; *Bolitho & Co.* v. *Gidley.*) 1896, A. C. 174. 1896, 2 Q. B. 48 C. A. 1905, A. C. 98.

But if she brings an action, costs may be ordered to be paid out of her estate notwithstanding a restraint. (M. W. P. Act, 1893.) 56 & 57 Vict. c. 63.

But an unmarried woman cannot upon marriage evade her existing debts, by settling her property on herself with a restraint on anticipation. (*Jay* v. *Robinson.*) 25 Q. B. D. 467.

'Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole.*' M.W.P. Act, 1882, s. 1, sub-s. 5.

8 Ed. VII, c. 27. (M.W.P.Act, 1908.)

'A married woman having separate property is liable to the maintenance of her parents as though she was a *feme sole*.'

The Husband's Liability.—This is part of the law of agency. Cohabitation raises a presumptive authority in the wife to contract for her husband in all domestic matters usually entrusted to a wife, to the extent suitable to the position in which they live. And a woman cohabitating with a man as his reputed wife, though not married, is presumed to have an authority to bind him for goods suitable to the position he permits her to assume.

'In the ordinary case of the management of a household the wife is the manager of the household, and would necessarily get short and reasonable credit on butchers' and bakers' bills and such things, and for these she would have authority to pledge the credit of the husband. I think that if husband and wife are living together, that is a presumption of fact from which the jury may infer that the husband really did give his wife such authority. But even then I do not think that the authority would arise so long as he supplied her with the means of procuring the articles otherwise.' (Per Lord Blackburn, in *Debenham* v. *Mellon*.)

6 A. C. at p. 36.

This presumption, which extends to contracts for necessaries, *i.e.* articles suitable to the station he permits her to assume, is rebuttable by proof of sufficient provision or allowance made by him, though this arrangement is not known to those who supply the necessaries.

Illustration.

Where a husband set aside £2000 a year (out of his total income of £2500) for household expenses to be paid into a separate banking account, this was held to deprive the wife of all power to pledge her husband's credit. (*Morel & Co.* v. *Earl of Westmorland.*) 1904, A. C. 11.

The presumption is also rebuttable by proof of prohibition to wife or tradesman. If, however, the husband has allowed previous dealings with the tradesman, a prohibition to the wife is useless; it must be given to the tradesman. (*Jolly* v. *Rees*, and *Debenham* v. *Mellon.*) 15 C. B. N. S. 628. 6 A. C. 24.

A general notice in the newspapers repudiating liability rebuts the presumption of authority raised by cohabitation, but those tradesmen to whom the husband has in the past held his wife out as his agent, *e.g.* by paying the bills, must now be given express actual notice of the revocation.

If the husband dies or becomes insane during the period of agency, the authority is revoked, and should she in ignorance still purport to act as his agent for the purchase of necessaries, she will be liable, it seems, on the strength of *Yonge* v. *Toynbee*, on *an implied warranty of authority* within the rule laid down in *Collen* v. *Wright.* The executors of the husband are not liable in such a case. (*Blades* v. *Free.*) 1910, 1 K. B. 215 (C. A.). 8 E. & B. 647. 9 B. & C. 167.

In *Drew* v. *Nunn*, a strong Court of Appeal consisting of Brett, Bramwell, and Cotton, L.JJ., held that if a husband represented to the creditor 4 Q. B. D. 661.

that his wife had his authority to purchase necessaries, then though insanity put an end to the authority as between husband and wife, the creditor was entitled to act on the representation till he had notice of the insanity. In this particular case, the husband became insane, his wife knowing him to be insane ordered necessaries, he recovered and declined to pay, but lost his case on the grounds above stated.

If husband and wife are living apart, there is no presumption in favour of the authority.

In separation by consent.—The jury may infer an implied authority for necessaries unless the wife has an adequate or agreed allowance which is duly paid, but this may be rebutted, *e.g.* by proving that the husband gave the tradesman notice not to give his wife credit. (Cf. *Eastland* v. *Burchell.*)

3 Q. B. D. 432.

In separation by husband's fault.—The wife has authority to bind him for necessaries. (*S.C.*)

If by wife's fault.—She cannot bind him. (*Wilson* v. *Glossop.*)

20 Q. B. D. 354, C. A.

If separation under the Matrimonial Causes Act, 1857, or the Summary Jurisdiction (Married Women) Act, 1895.—If alimony is decreed and not paid, she can bind him for necessaries.

CHAPTER VI

FLAWS IN CONTRACT

THERE are circumstances which invalidate contract on the ground that there has been no real consent, viz. Mistake, Fraud, Innocent Misrepresentation, Duress, and Undue Influence.

Mistake

Mistake, when it operates at all, makes a contract **void**; the other flaws make it **voidable.** Mistake operates in four cases:—

i. Mistake as to the nature of the obligation;
ii. Mistake as to the person contracted with;
iii. Mistake as to the subject-matter of the contract, either as to its **existence** or its **identity**;
iv. Mistake of one party as to the intention of the other party, such mistake being known to the other party.

Illustrations.

(*a*) A., a man who is illiterate (*Thoroughgood's Case*), 2 Co. Rep. 9. or blind (*Foster* v. *Mackinnon*), or acting from misplaced L. R. 4 C. P. 704. confidence, but without negligence (*Lewis* v. *Clay*), signs 1898, 2 L. J. Q. B. 224.

a document of one sort, being told that it is a document of quite another sort. *Held*, that his mind did not accompany the signature, and that, therefore, in the eye of the law, he had not made the document.

(*b*) A., who was in the habit of dealing with B., a manufacturer, sent him an order for some of his manufactured wares. That day B.'s foreman, C., had bought B. out, but on receiving the order addressed to B., executed it himself and sent the goods to A. without notice of the change. *Held*, that C. could not maintain an action against A. for the price, because A. had not contracted with him. (*Boulton* v. *Jones.*)

2 H. & N. 564.

Two cases illustrating what is and what is not mistake are as follows:—

The plaintiffs were manufacturers in Ireland. A man, Blenkarn, of 37, Wood Street, Cheapside, wrote to them for goods on paper headed '37, Wood Street,' and signed with something that looked like 'Blenkiron & Co.,' *there being a respectable firm of that name at* 123, *Wood Street.* Goods were accordingly sent to 'Blenkiron, 37, Wood Street,' which Blenkarn sold to defendants. *Held*, that there was no contract with Blenkarn, and the goods belonged to the plaintiffs. This was *mistake*; 'of him they (the plaintiffs) knew nothing, of him they never thought, with him they never intended to deal. A contract never came into existence.' (Per Cairns, L.C., in *Cundy* v. *Lindsay;* cf. also *Baillie's Case.*)

3 Ap. Cas. 459. 1898, 1 Ch. 110.

A man, Wallis, had ordered goods from the plaintiffs in the name of Hallam & Co., non-existent people, on paper headed with a picture of extensive factories and statements that the company had depôts at Belfast, Lille, and Ghent. Goods were sent him, which he sold to the defendants. *Held*, that here there *was a contract with the writer of the letter*, there being no evidence to show that there was *another entity called Hallam & Co. This was*

not mistake, though it might be fraud, and the property passed to the defendants. (*King's Norton Metal Co.* v. *Edridge.*) 14 Times L. R. 98, C. A.

(*c*) A. contracts to sell to B. a cargo of corn supposed to be on the voyage to England. As a fact, at the time of the contract, owing to its having become heated, it had been landed and sold at an intermediate port. *Held*, that as the supposed subject-matter was no longer existing, the sale was void. (*Couturier* v. *Hastie.*) 5 H. L. C 673.

A. agrees to buy from B. a cargo to arrive on the ship *Peerless* from Bombay. There were two ships called *Peerless*, one due to arrive in October, the other in December. A. meant the first, B. meant the second. *Held*, no contract. (*Raffles* v. *Wichelhaus.*) 2 H. & C. 906.

(*d*) A. buys oats from B., thinking that B. is promising him old oats, and B. knows that A. thinks so. B. supplies new oats. No contract. (*Smith* v. *Hughes.*) L. R. 6 Q. B. 597.

Fraud

Fraud consists in a false representation of fact, made by one party to the contract with a knowledge of its falsehood, or without an honest belief in its truth, with the intention that it shall deceive and be acted on, and which does in fact deceive the other party and induces the contract. There must be 'moral delinquency' present; the making a false statement through want of care or gross carelessness, or without appreciation of the importance and significance of the words used, is not fraud unless indifference to their truth is proved (*Angus* v. *Clifford*), nor is a false representation honestly believed though on most in- 1891, 2 Ch. 449.

sufficient grounds. The absence of reasonable grounds for belief is not equivalent to fraud, though it may be appealed to as strong evidence of fraud. (*Derry* v. *Peek.*)

14 Ap. Cas. 337.

The expression, 'false representation of fact', may be taken to include 'such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false.' (Per Lord Cairns, in *Peek* v. *Gurney.*)

L. R. 6 H. L. p. 403.

Fraud, if proved, makes a contract **voidable.** If the plaintiff claims damages he must show that he has suffered the damages which he claims.

Illustrations.

(*a*) G., a moneylender of most unsavoury reputation, advertised under the fictitious name of Addison, and B. borrowed money from him, and gave a promissory note as security. G. brought an action on the note, and the jury found the following facts: that the plaintiff fraudulently concealed his identity in order to induce defendant, B., to borrow from him as if from another, and that B. was so induced, that B. entered into the contract, believing the moneylender to be called Addison, and that he repudiated the contract within a reasonable time after discovering the truth. *Held*, that as B. would not have contracted had he known whom he was contracting with, the fraud was material, and that B. was entitled to repudiate. (*Gordon* v. *Street.*)

1899, 2 Q. B. 641, C. A.

(*b*) A. and others were directors of a tramway company which had power by a special Act to make tramways, and, if they obtained the consent of the Board of Trade, to use

steam for the purposes of traction. To get the special Act the company required the approval of the Board of Trade of their plans; and having obtained this approval, they assumed that the consent of the Board to the use of steam followed as a matter of course. They issued a prospectus, in which stress was laid on the fact of their having obtained this consent. The Board of Trade refused its consent, the company was wound up, and B., a shareholder, brought an action of deceit against the directors. *Held*, by the House of Lords, that as the directors honestly believed what they said, an action for deceit would not lie, though the grounds for their belief were unreasonable. (*Derry* v. *Peek.*) 14 Ap. Cas. 337.

This, it should be said, was an action in tort, but the nature of deceit in tort is the same as that of fraud in contract. This case, though an excellent case as showing the nature of deceit, is no longer an authority on the conduct of directors. Their duties are regulated by the Companies (Consolidation) Act, 1908, which consolidates previous statutes. (See next page.)

The cases of *Pasley* v. *Freeman*, and *Langridge* v. *Levy*, being cases in tort, are not here dealt with.

(*c*) A. knowing of a latent defect in his ship concealed it, made a fraudulent representation as to its condition, and sold it to B. 'with all faults'. *Held*, this was fraud. (*Schneider* v. *Heath.*) 3 Camp. 505.

(*d*) A. sold a cannon to B., in which there was a flaw. A. filled up the flaw with a plug of metal. B. never inspected the cannon. B. fired it off and it burst. *Held*, in an action for the price, that as B. had never inspected it, he was not deceived by what he had not seen. Deceit which does not deceive is not fraud. (*Horsfall* v. *Thomas.*) H. & C. 90.

(*e*) A. and others, directors of a company, issued a prospectus in which there were false statements. B. subsequently bought shares in the company in the market,

relying on the prospectus. B. was not one of those to whom the prospectus had been sent. *Held*, that the intention to deceive only extended to those to whom the prospectus had been sent, and that after allotment, the prospectus was dead and the contract cannot be set aside.

L. R. 6 H. L. 377. (*Peek* v. *Gurney*.) The proper purpose of a prospectus is to invite persons to become allottees. But if, as a fact, the prospectus was issued to a person with the intention of inducing him not only to apply for allotment, but also to buy shares afterwards in the open market, and he does

1896, 1 Q. B. 372. buy such shares, the prospectus is not dead. (*Andrews* v. *Mockford*.) But the remedy is in tort for deceit.

(*f*) A., B., and C., directors of a company, issued a prospectus inviting subscriptions for debentures, stating that the objects of the issue were the completion of the company's buildings and the general development of its trade. The real object was to pay off pressing claims. D. was hereby induced to take shares. *Held*, that a misstatement of intention is a misstatement of fact, 'the state of a man's mind is as much a fact as the state of his

29 Ch. D. at p. 483. digestion.' (*Edgington* v. *Fitzmaurice*.)

So if A. says, 'I am of opinion that my horse is worth £100', when he is not of that opinion, that is a false representation of fact; if, however, he gives an honest opinion for what it is worth, that, although erroneous, is not a false representation of fact.

Ed. VII, c. 69, § 84. The Companies (Consolidation) Act, 1908, which repeals the preceding Company Acts, gives an action for damages against any one who is or has agreed to be, or has allowed himself to be named in the prospectus as, a director, and any one who is a promoter, or has authorised the issue of the prospectus, to any person who has been induced to subscribe for shares in a company by untrue statements in the prospectus, unless he can show (*a*) that he not only

The remedies of the defrauded person are as follows: he can treat the contract as valid, or he

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believed the statements when the shares were allotted, but had reasonable ground for such belief; or (*b*) that it was a correct statement of the report of an engineer, valuer, accountant, or other expert, and even then he will be liable if it be proved that he had no reasonable ground for believing in his competence; or (*c*) that it was a fair representation of a statement made by an official person or in an official document; or (*d*) that having consented to become a director, he withdrew his consent before issue of prospectus, and it was issued without his authority or consent; or (*e*) that the prospectus was issued without his knowledge and consent, and that when he found out he gave reasonable public notice that he did not know or consent, or (*f*) that after issue and before allotment, on becoming aware of any untrue statement in the prospectus, he withdrew his consent thereto and gave public notice of withdrawal and explanation.

The Act also contains stringent provisions regarding the appointment and qualification of directors, the conditions on which allotment may be made and business be commenced, the filing of the prospectus *and what it must contain*, registration of mortgages and charges, the penalties for not registering, and appointment of auditors. To make a false statement in any document required by or for the purposes of this Act is a misdemeanour punishable by not more than two years' imprisonment with or without hard labour.

63 & 64 Vict. c. 48

See App. A.

§ 281.

Illustration.

Thus a director knew that a prospectus did not disclose a contract which was in fact material, but which he was advised was not, or which he honestly believed not to be material. *Held*, he was liable to a shareholder who had

can repudiate it. Should he choose to repudiate, he may as plaintiff take proceedings in Equity to get the contract set aside, or he may as defendant defend any action brought against him in Equity or at Common Law. But he must disclaim the contract at the earliest opportunity, when it is still possible for the parties to be put in *status quo ante*, *e.g.* the defrauded person must not have taken benefit under the contract, and there must have been no resale to a *bonâ fide* purchaser for value. (*White* v. *Garden*, and *Ayscough* v. *Life Assurance Deposit Co.*) Unreasonable delay after discovery of the fraud is some evidence of an intention to treat the contract as valid, and adopt the alternative remedy of suing for damages at Common Law.

10 C. B. 919. 6 E. & B. 761.

If he choose to go on with the contract, he may bring an action for damages for the loss sustained.

Innocent Misrepresentation

Innocent misrepresentation is a misstatement of fact made without knowledge of its untruth, and without intention to deceive, which either induces a party to enter into a contract or is a condition or term of the contract.

The law at present is a fusion of the practice of the Courts of Common Law and Equity.

1904, A. C. 342.

bought shares on the faith of the prospectus. (*Shepheard* v. *Broome.*)

The Common Law took no notice of innocent misrepresentation, unless, apart from the exceptional cases mentioned below, it was a condition or term of the contract, and if such term was broken, or such condition unfulfilled, the contract was **voidable**; the aggrieved party could repudiate the contract, or if he chose bring an action for damages.

Illustrations.

(*a*) A. agreed to buy from B. his year's crop of hops. As, however, the Burton brewers were declining to buy hops to which sulphur had been applied, A. had specially asked the question, saying that if sulphur had been used he must decline to consider any offer. B. said that none had been used, forgetting that a very small portion of his ground had been so treated for experimental purposes, and that the sulphured and unsulphured hops had been mixed up together. *Held*, that the undertaking was a preliminary stipulation, and that if it had not been given A. would not have gone any further. In this sense it was the condition upon which A. contracted. B., therefore, could not enforce the sale. (*Bannerman* v. *White.*) 10 C. B. N S 844.

(*b*) A. chartered B.'s ship, the *Martaban*, the terms of the charter-party being, *inter alia*, that the *Martaban*, *now in the port of Amsterdam*, should proceed to Newport and load a cargo of coals to carry to Hong Kong. The ship was not at Amsterdam at the time, and only got there four days later. On her arrival at Newport A. declined to load her. *Held*, that he was within his rights, that the ship's readiness in the port of Amsterdam was a term in the contract. (*Behn* v. *Burness.*) 3 B. & S. 751.

Moreover, the Common Law said that in that

exceptional class known as **contracts 'uberrimae fidei'**, which demand the utmost good faith, disclosure of all material circumstances such as would affect the judgment of the other party in taking the risk was a condition of the contract, and that not only active misrepresentation but mere non-disclosure of such circumstances entitled the other party to repudiate.

Among the contracts in which 'uberrima fides' is required are all contracts of assurance, and it is sometimes said, though this is not free from doubt, contracts for the sale of land and for allotment of shares in companies. The offeror in such cases has from his position peculiar sources of information, which information, if material, he is bound in honesty to communicate to the other party. 'The insured generally puts the risk before the insurer as a business transaction, and the insurer **on the risk stated** fixes a proper price to remunerate him for the risk to be undertaken.' (Per Romer, L.J., in *Seaton* v. *Heath*.)

1899, 1 Q. B. at p. 793.

In marine insurance the assured must disclose to the insurer before the contract is concluded every material circumstance which is known to the assured, and he is deemed to know every circumstance which in the ordinary course of business ought to be known by him. If these disclosures are not made the insurer may avoid the contract. Every circumstance is material which would influence the judgment of a prudent insurer in

fixing the premium or determining whether he will take the risk.

In the absence of inquiry the assured need not disclose what the insurer knows or is presumed to know, such as matter of common notoriety, or things which in the ordinary course of his business he ought to know. 6 Ed. VII, c. 41.

Illustrations.

(*a*) A., in 1864, effected an insurance with B. on A.'s vessel the s.s. *Georgia*, chartered on a voyage from Liverpool to Lisbon and the Portuguese settlement in West Africa and back. A. did not mention that the ship had been the notorious Confederate cruiser of the same name; the fact was universally known in Liverpool, but was not present to B.'s mind at the moment he took the risk. Within a week after leaving Liverpool the *Georgia* was captured by a United States frigate. *Held*, that the non-disclosure afforded a good defence. (*Bates* v. *Hewitt.*) L. R. 2 Q. B. 595.

Such information would certainly have affected the rate of premium had the underwriter been willing to take the risk.

(*b*) A., in effecting a policy of marine insurance, insured the goods greatly above their value, and did not disclose this over-valuation. It was in evidence that insurances of this sort were regarded as speculative, and some underwriters refused to touch them. *Held*, that the information was material, and that all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act. 'Excessive valuation not only may lead to a suspicion of foul play, but it has a direct tendency to make the assured less careful in selecting the ship and captain.' (*Ionides* v. *Pender.*) L. R. 9 Q. B. 531.

17 Wend. 359. See also the American case, *New York Bowery Fire Insurance Co.* v. *New York Fire Insurance Co.*, quoted in the above case, where non-disclosure of the fact that the assured had been so unlucky as to have had several fires, in each of which he was heavily insured, was held fatal.

If the insurance is effected through an agent who possesses material information, though it be unknown to his principal, non-disclosure by the agent is fatal (*Blackburn, Low & Co.* v. *Haslam*); but not so if the information is known only to an agent through whom the policy was not effected. (*Blackburn, Low & Co.* v. *Vigors.*)

21 Q. B. D. 144.

12 Ap. Cas. 531.

(*c*) A., the governor of a fort in Sumatra, fearing capture by the French, instructed his brother in London to insure the fort for a year. In his letter he mentioned the weakness of the place, and that he thought a French attack was probable. The brother insured it with B., but did not mention A.'s apprehensions. The fort was taken within the year insured. B. resisted payment on the ground of non-disclosure. *Held*, that as the fort was built for defence against the natives, its weakness was immaterial as regards the French, and as to whether they were likely to attack it, that was a question which people in England could answer better than the governor himself. Judgment for plaintiff. (*Carter* v. *Boehm.*)

1 W. Bl. 594.

(*d*) A. sells to B. the lease of what is described as 'a free public-house', whereas the lease 'tied' the house to a particular brewery. *Held*, this misdescription was fatal. (*Jones* v. *Edney.*) If the purchaser has paid money on deposit he may recover it back (*Flight* v. *Booth*); while if the misdescription is not very important, the purchaser may be directed to complete and the seller to make pecuniary compensation.

3 Camp. 285.

1 Bing. N. C. 370.

The Courts of Equity took a view of their own. If the representation were untrue in fact, and had

been material in inducing the contract, the Courts of Equity declined to decree specific performance to help a man 'who, having obtained a beneficial contract by a statement which he now knows to be false, insists on keeping that contract', and might even direct the contract to be set aside. (Per Jessel, M.R., in *Redgrave* v. *Hurd*.) 20 Ch. D. 1.

The fusion of Law and Equity by the Judicature Act works out thus—

(i.) An innocent and material misrepresentation inducing a contract is a ground for cancellation of the contract or for refusing specific performance, but not for damages.

(ii.) An innocent misrepresentation, if a term or condition in the contract, or, in other words, one which strikes at the root of the contract, entitles the aggrieved party to repudiate, or to go on with the contract and sue for damages. If he takes the latter course he is said to sue on a **'warranty ex post facto'**, because he elects to treat the breach of the term as a breach of warranty, which only gives a right to damages. See *infra*.

(iii.) Contracts **uberrimae fidei** can be repudiated not only because of a misrepresentation, but on the ground of the non-disclosure of material facts.

The difference between condition, term, and warranty is as follows:—

(i.) A *condition precedent* is one which the parties expressly or impliedly agree must be fulfilled before the con-

tract can come into existence: *e.g.* A. agrees to sell his horse to B. subject to its passing a veterinary examination. If it does not, there is no contract. This is sometimes called a 'suspensive' condition, for it hangs the contract up.

(ii.) A *condition subsequent* is one which, if it occurs, destroys the contract, which up to that moment was in existence: *e.g.* A. sells his horse to B., but if the horse goes lame within a month, B. may return it. This is sometimes called a 'resolutive' condition.

(iii.) A *term* is an integral part of the contract, and if it is broken the party cannot get what he bargained for: *e.g.* A. agrees to buy 1000 tons anthracite coal, ex s.s. *Ethiopian*, due to-morrow in port. When the coal is landed, it is found to be ordinary steam coal. A. has not got what he bargained for, and can repudiate, or he can accept and sue for damages. (*Hamor* v. *Groves.*)

15 C. B. 667.

(iv.) An *express warranty* is a collateral engagement, the breach of which does not entitle the injured party to repudiate, but only to sue for damages: *e.g.* A. buys B.'s black horse Cæsar with a warranty of soundness. The horse proves to be unsound. A. has got what he bargained for, and the property has passed. He can sue for damages for a breach of warranty, or resell and sue for the difference in price, or defend and pay into Court the real value. But it must be remembered that the parties may agree expressly or impliedly that a warranty may be treated as a term or a condition, and *vice versâ*.

(v.) An *implied warranty or condition* is one which, unless the circumstances of the contract are such as to show a different intention, the law will imply: *e.g.* in a contract of a sale of goods by description, there is an implied condition that the goods shall correspond with the description.

See Sale of Goods Act, 1893, §§ 12, 13, 14, 15. App. D.

(vi.) In policies of insurance and charter-parties, what are called 'warranties' are treated as conditions, *e.g.* a

warranty of seaworthiness, and a breach of such avoids the contract.

Duress or Coercion

A promise made under duress is **voidable.** To constitute duress, there must be actual or threatened violence to life or limb against, or illegal imprisonment of, the party contracting, or his wife, parent, or child, and inflicted or threatened by the other party to the contract, or his agent, or by some one acting with his knowledge and for his advantage.

Threatening to destroy property, however valuable, is not duress. (*Skeate* v. *Beale.*) 11 A. & E. 983.

Even if the act were not legally 'duress', yet if there was practically compulsion, money paid can generally be recovered back on the ground of failure of consideration.

Undue Influence

This doctrine is of equitable origin.

Undue influence is influence gained by the unconscientious use of the power arising out of the circumstances of a relationship usually, though not necessarily, of a fiduciary character, wherever influence has been acquired and abused, confidence reposed and betrayed. (*Smith* v. *Kay.*) 7 H. L. C. 750.

This definition is vague, but the existence of undue influence is a question of fact, and cases

vary indefinitely. But there are some points to be considered, viz. absence of independent advice, seclusion from disinterested persons, gross improvidence, illiteracy, false allegations of consideration, the existence of a confidential or fiduciary relationship, *e.g.* of parent and child, doctor and patient, solicitor and client, priest and penitent, or trustee and *cestui que trust.*

The presence of circumstances of this sort raises a presumption unfavourable to the honesty of the transaction, and throws on the party supporting the transaction the onus of rebutting the presumption. Contracts vitiated by undue influence are **voidable** at the option of the injured party, but the contract must be repudiated within a reasonable time after the undue influence has ceased.

Illustrations.

(*a*) A., a man of no means and a member of a religious sect known as Exclusive Brethren, was employed as a travelling companion to B., an epileptic subject of large fortune. He converted B. to his own religious views; B. gave up his own home, came to live with A., and lived for the last seven years of his life in great seclusion with him. A. regulated not only his religion, but his diet and his medicine, and practically had the disposal of B.'s fortune. He obtained £140,000 from B., and tried to suppress all evidence of these transactions. 'He took possession, so to speak, of the whole life of the deceased.' (Per Wright, J.) *Held*, that the money had been obtained by the actual exercise of undue influence,

under the guise of religion, and must be refunded. (*Morley* v. *Loughnan.*) 1893, 1 Ch. 736.

(*b*) In 1868, A., a lady aged thirty-five, joined a sisterhood and bound herself to observe the rules of poverty, chastity, and obedience. The rule of poverty bound her to give up all her property either to her relatives, the poor, or the sisterhood; the rule of obedience required her to regard the voice of her superior as the voice of God, and forbad her to take external advice without the superior's leave. A. immediately made a will leaving all her property to the lady superior for the benefit of the sisterhood, and in 1872, having come into further property, transferred large sums to the superior. In 1879, A. left the sisterhood and revoked her will; but took no further steps till 1885, when she claimed restitution of her property, on the ground of undue influence of the superior and the absence of independent advice. *Held*, that though she could have made the claim on leaving the sisterhood, her acquiescence for so long a time, during which she had independent advice, barred her claim. (*Allcard* v. *Skinner.*) 36 Ch. D. 145, C. A.

(*c*) A., the client of B., a solicitor, without independent advice, made a voluntary conveyance to him of leasehold premises in trust for herself for life, and after her death, in trust for B.'s wife, who was her niece, for her separate use. *Held*, that the well-settled rule of equity being that such a gift could not be supported unless the donor had competent and independent advice in making it, the conveyance must be declared void. (*Liles* v. *Terry.*) 1895, 2 Q. B. 679.

A., a young man of nineteen, had incurred obligations for which, on attaining his majority, he gave securities to B., at the instigation of an older man, who had acquired great influence over him, and in concert with B. incited him to habits of extravagance and dissipation.

Held, that influence of this sort, though not parental, spiritual, or fiduciary, was undue influence, and that the jurisdiction of Courts of Equity will be employed to protect infants, and is not confined to cases where there has been an abuse of a strictly fiduciary character. The principle applies to all cases where influence is acquired and abused, and confidence reposed and betrayed. (*Smith* v. *Kay*.)

7 H. L. C. 750.

It has been thought desirable to insert here some notice of recent legislation on a topic akin to undue influence.

Moneylenders

63 & 64 Vict. c. 51.

In 1900, an Act with very stringent provisions was passed with respect to moneylenders. It provided that hereafter where a moneylender takes proceedings for the recovery of money lent, or for the enforcement of any agreement or security made or taken in respect of money lent, and there is evidence which satisfies the Court that the interest is excessive, or that the amounts charged for expenses, inquiries, &c., are excessive, and that in either case the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity (in England, Wales, or Ireland) would give relief, the Court may reopen the transaction, take an account between the parties, reopen any account already taken, and relieve the person sued from payment in excess of what the Court

decides to be fairly due in respect of principal, interest, and charges, having regard to the risk and all the circumstances. If any excess has been paid or allowed in account by the debtor, the Court may order the creditor to repay it, and may set aside or alter any security given or agreement made in respect of the loan, and if the moneylender has parted with the security, may order him to indemnify the borrower or other person sued.

Nothing aforesaid shall affect the right of any *bonâ fide* assignee or holder for value without notice.

The expression 'moneylender' includes 'every person whose business is of moneylending, or who advertises or announces himself, or holds himself out in any way as carrying on that business', but does not include any pawnbroker or friendly society, &c., or *bonâ fide* banking and insurance companies, or any person *bonâ fide* carrying on any business not having for its primary object the lending of money.

A person to whom the Act applies must register himself in his own or usual trade name, with all the addresses at which he carries on his business, under penalties of fine and imprisonment.

This Act is remarkable as giving relief far beyond that which the Court of Chancery ever gave. 'The Chancery', said Lord Nottingham, in *Maynard* v. *Moseley*, 'mends no man's bargains'. 1676, 3 Sw. 655. The Court can now remodel the bargain. Nor is

the relief limited to cases where before the Act the Court of Chancery would have given relief. The Court has discretion to weigh each case on its own merits and to look behind a class of contract which peculiarly lends itself to an abuse of power. (*Samuel* v. *Newbold.*)

906, A. C. 461.

CHAPTER VII

ILLEGALITY

THERE are some contracts which the law either forbids or declines to recognise. Such contracts are called illegal, or in other words the consideration which supports them is illegal.

This illegality may exist by the rules of Common Law, or it may be created by statute.

Those illegal at Common Law.

These include agreements (*a*) to commit crime or civil injury; (*b*) tending to impede the administration of justice, or (*c*) to the abuse of legal process, as maintenance or champerty; (*d*) tending to atheism; (*e*) unduly limiting free individual action in respect of (i.) marriage, (ii.) testamentary disposition, or (iii.) trade; (*f*) immoral contracts, and (*g*) those coming under the vague description of being against public policy; but public policy is not a safe ground for legal decision. (*Janson* v. *Dreifontein Consolidated Mines.*) 1902, A. C. 484.

Illustrations.

(*a*) A. contracted with B. to beat C. 'out of such a close'. *Held*, that the contract was illegal and void, 'for an assumpsit to beat one is naught'. (*Allen* v. *Rescous.*) 2 Lev. 174

(*b*) A. sued B. on his promise under seal to repay £350, which sum A. had advanced for the purpose of buying off a prosecutor, and so stifling a prosecution for perjury. *Held*, that this consideration being illegal, tainted the deed and made it void. 'You shall not stipulate for iniquity. All writers upon our law agree in this—no polluted hand shall touch the pure fountains of justice. *Procul o, procul este, profani!*' (*Collins* v. *Blantern.*)

2 Wils. 341.

The law will, however, allow a compromise of all offences, though made the subject of a criminal prosecution, for which the injured party might sue and recover damages in a civil action, *e.g.* a common assault. But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it. (Per cur. *Keir* v. *Leeman;* and see *Windhill Local Board* v. *Vint.*)

6 Q. B. 321.

45 Ch. D. 351, C. A.

(*c*) A. improperly, and for the purpose of stirring up litigation, encourages, 'maintains' or assists B. to bring an action, or to make a defence which he has no right to make and in which A. has no interest. This is *maintenance* and a civil wrong. (See *Findon* v. *Parker*, and *Bradlaugh* v. *Newdigate.*)

11 M. & W. 682.

11 Q. B. D. 1.

It would not, however, be maintenance in A. to help a poor man out of charity (*Harris* v. *Brisco*), a relative (*Hutley* v. *Hutley*), or a dependant, or in a cause where A. has a common interest recognised by law (*Alabaster* v. *Harness*). Though there is the inducement of a common religious belief which leads a rich person out of charity to help a poor one in defending a suit, the help is none the less charitable. Some poor persons had removed child relatives from an institution of whose religious teaching they disapproved, whereupon the institution took proceedings in Chancery to recover the children. The 'Kensit Crusade Committee' helped the poor persons

17 Q. B. D. 504.

L. R. 8 Q. B. 112.

1905, 1 Q. B. 339, C. A.

to defend. *Held*, that this was not maintenance. (*Holden v. Thompson & Sons.*) 1907, 2 K. B. 489.

So legitimate action in commercial competition is not maintenance. A. and B. were rival manufacturers of a certain apparatus. A. obtained contracts from three of B.'s customers who were under contract to use B.'s machine, agreeing to indemnify them against any claims for breach of contract. In two cases B. recovered damages which A. paid. B. then sued A. for maintenance. Judgment for defendant. (*British Cash Conveyors v. Lawson Store Service.*)[1] 1908, 1 K. B. 1006. (C. A.)

Champerty is the maintaining of a suit for a share of the

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[1] From the judgments of Cozens Hardy, M.R., and Fletcher Moulton, L.J., in the above case it would seem that the old law of maintenance is almost obsolete. At one time the purchase of a *chose in action* was not only a civil wrong but a crime: and this explains why the Common Law did not allow the assignment of choses in action. It was also maintenance to give evidence in a case without being subpœnaed. With changing views as to public policy, exceptions have been cut out, but the list of such exceptions is probably not complete or closed. No transaction can be maintenance if the courts treat it as valid, and enforce obligations arising thereunder. Contracts of indemnity are well known to the law, for such are contracts of marine and fire insurance, insurance of employees under the Workmen's Compensation Acts, and contracts of reinsurance. The modern view of the law was laid down by Lord Abinger sixty-five years ago in *Findon v. Parker*: 'The law of maintenance is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defences which they have no right to make.' 11 M. & W. 675.

proceeds; and this was held to be so even when A. was maintaining a relative and had a collateral interest in the suit. (*Hutley* v. *Hutley*.)

A contract by A. to communicate information on terms of getting a share of any property recovered by means of that information, is not void for champerty, but if the person giving the information is also to assist in recovering, it is. (*Rees* v. *De Bernardy*.)

1896, 2 Ch. 437.

(*d*) A. hired B.'s rooms for a series of blasphemous lectures. B., on discovering their nature, declined to complete the agreement. *Held*, that A.'s purpose was illegal, and that the contract could not be enforced. 'Christianity is part and parcel of the law of the land.' (*Cowan* v. *Milbourne*.)

L. R. 2 Ex. 230.

(*e*) (i.) A. promised B. that he would not marry any one but her, and that if he did so he would pay her £1000 three months after the wedding. Ten years after he married some one else. *Held*, that the promise was void as being in restraint of marriage, for his promise was not to marry B., but to marry no one else, and B. might have refused him. A *general* restraint is against the policy of the law, for it 'encourages licentiousness and tends to depopulation.' (*Lowe* v. *Peers*.)

4 Burr. 2225.

A partial restraint may be valid, *e.g.* conditions prohibiting marriage before twenty-one (*Stacpole* v. *Beaumont*), or with a Scotchman (*Perrin* v. *Lyon*), or with Mr. H. (*Jervois* v. *Duke*), or with a domestic servant (*Jenner* v. *Turner*).

3 Ves. 89. 9 East, 170. 1 Vern. 19. 16 Ch. D. 188.

Second marriages may be absolutely restrained. (*Allen* v. *Jackson*.)

1 Ch. D. 399.

Marriage brocage contracts, *i.e.* to bring about a marriage (*Cole* v. *Gibson*), or contracts providing for the *future* separation of a married couple (*Westmeath* v. *Westmeath*), are void. Those, however, relating to *immediate* separation are valid.

1 Ves. 503. 1 Dow. & Cl. 519.

A contract for reward to introduce another to persons of the opposite sex with a view to marriage with one of those persons is a marriage brocage contract and illegal; and money paid under such a contract can be recovered back, though the other party has brought about introductions and incurred expense. (*Hermann* v. *Charlesworth.*) 1905, 2 K.B. 123, C. A.

This was not a 'turpitudo,' but merely *nudum pactum*, and no consideration. (Per Mathew, L.J., at p. 136.)

(ii.) An agreement to use influence with a testator in favour of a person is void.

(iii.) Contracts in restraint of trade are illegal, unless the restraint is within reasonable limits, having regard to the interests of the parties. The question of reasonableness is matter of law and for the judge. (*Dowden and Pook* v. *Pook.*) 1904, 1 K. B. 45, C. A.

'N., a patentee and manufacturer of guns and ammunition, sold his business and patents to the M.-N. Company, under an agreement that for twenty-five years he would not directly or indirectly engage, except on behalf of the company, in the business of a manufacturer of guns, &c. Subsequently he joined another company of the same kind as the M.-N. Company, which thereon applied for an injunction to restrain him. He set up the defence that the contract was bad, being in general restraint of trade. *Held*, by the House of Lords, that the covenant, though unrestricted as to space, was not, considering the nature of the business and the limited number of customers, *i.e.* our own and foreign governments, wider than was necessary for the protection of the company, nor injurious to public interests, and therefore was valid. (*Maxim-Nordenfeldt Co.* v. *Nordenfeldt.*) 1894, A. C. 535.

The validity of such agreements must be tested by the consideration of what is, on the one hand, necessary to protect the interest of the covenantee, and, on the other, not injurious to the public interest, which is against

monopolies. In other words, the reasonableness of the contract must be determined by the circumstances in each case, as was said in *Rousillon* v. *Rousillon*.

14 Ch. D. 351, 1892, A. C. 25.

See also, in this connection, *Mogul S.S. Co.* v. *McGregor, Gow & Co.*

(*f*) Immorality, in this connection, is sexual immorality.

A. promises B. that if she will live with him as his mistress he will give her £100. This consideration is immoral and the promise is bad, whether it was by deed or parol. (See *Ayerst* v. *Jenkins*.)

L. R. 16 Eq. 275.

A. lives with B. as his mistress, and afterwards, in consideration of the cohabitation, promises her an annuity. *Held*, that the consideration was not illegal, but past, and therefore of no value. (*Beaumont* v. *Reeve*.) The promise would have been binding if under seal.

8 Q. B. 483.

A., a coachbuilder, sold a brougham to a prostitute, knowing what she was, and that she intended to use it as part of her show to attract men. *Held*, that he could not recover in an action for the price. (*Pearce* v. *Brooks*.) Here the transaction was in itself innocent, but it was by both intended to further an immoral purpose, and so was void. But when a laundress sued a prostitute for washing her clothes, which consisted principally of expensive dresses, and there were also some gentlemen's nightcaps, and evidence was given for the defence that the plaintiff understood the defendant's situation and the purpose to which the articles in question were applied, the Court was of opinion that there was no immorality in the contract. *Buller, J.* 'What do you mean by the expression of clothes used for the purposes of prostitution? This unfortunate woman must have clean linen, and it is impossible for the Court to take into consideration which of these articles were used by the defendant to an improper purpose and which were not.' (*Lloyd* v. *Johnson*.)

L. R. 1 Ex. 213.

1 B. & P. 340.

(*g*) The Earl of Bridgewater left his estates to Lord

Alford, with the condition that if he died without being made a marquis or a duke they should go over. The condition was not satisfied. *Held,* that the estates did not go over, as the limitations imposed were contrary to public policy, which was against people besieging the public service for titles of which they might be unworthy. (*Egerton* v. *Earl Brownlow.*) 4 H. L. C. 1.

In the public interest, contracts are held to be illegal which purport to sell public offices (*Card* v. *Hope*), or to assign the salaries of pensions attached thereto. (See *Wells* v. *Foster.*) 2 B. & C. 661. 8 M. & W. 149.

(*h*) A promise to marry made by a man who, to the knowledge of the promisee, was married at the time of the promise, is void as against public policy. (*Wilson* v. *Carnley.*) 1908, 1 K. B. 729. (C. A.)

So, too, trading contracts with the enemy are forbidden by law. (*Esposito* v. *Bowden.*) 7 E. & B. 763.

Those illegal by statute.

(i.) A statute may impose a penalty without avoiding the contract (though *primâ facie* a penalty implies a prohibition). (*Bensley* v. *Bignold.*) 5 B. & Ald. 335.

Illustration.

A., licensed to sell tobacco, omitted to have his name painted up on the licensed premises, as required by 6 Geo. IV. c. 81. *Held,* in an action for the price of goods sold, that the contract was not avoided, but that the only effect of the Act of Parliament was to impose a penalty for the purposes of the revenue on the carrying on of the trade without complying with its requisites. (*Smith* v. *Mawhood.*) 14 M. & W. 452.

(ii.) A statute may avoid the contract and

penalise or prohibit, *e.g.* 12 Geo. II. c. 28, and 18 Geo. II. c. 34, which forbid certain games with cards, &c., and penalise the players. (*McKinnell* v. *Robinson.*)

3 M. & W. 434.

(iii.) A statute may avoid the contract without prohibiting or penalising it. In this class the most important is the **wagering contract,** which has been defined by a learned judge as follows:—

'A wagering contract is one by which two persons professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent on the determination of that event, one shall win from the other and that other shall pay or hand over to him a sum of money or other stake, neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event. If either of the parties may win, but cannot lose, or may lose but cannot win, it is not a wagering contract.' (Per Hawkins, J., in *Carlill* v. *Carbolic Smoke Ball Co.*)

1892, 2 Q. B. at p. 490.

It is, however, doubtful if there would be a general agreement that the event must be 'future'; is not a bet on a past event which is unknown to the parties a 'wagering contract'? Again, the owner of a racehorse who bets on it has an interest in it other than the amount of his bet, and one which closely resembles the interest of the shipowner in the ship which he insures.

But the word 'wager' in its legal sense does not include policies of insurance in which the assured has what is termed an insurable interest, though, strictly speaking, an insurance is as much a wager as a bet on a horserace. *Inf.* p. 110.

At Common Law an action would lie on a wager, subject to this, that it did not tend to indecent evidence or to disturb the peace of the individual or of society, and was not against public policy. (*Hussey* v. *Cricket; Da Costa* v. *Jones* (on the sex of the Chevalier D'Eon); *Ditchburn* v. *Goldsmith; Eltham* v. *Kingsman.*) 3 Camp. 168. 2 Cowp. 729. 4 Camp. 152. 1 B. & Ad. 698.

The statute 8 & 9 Vict. c. 109, § 18, enacted that—

'All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be *null and void*, and that no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. Provided always that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or towards any plate, prize or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise.'

This did not, however, make wagers illegal. The whole subject was reviewed in the case of *Read* v. *Anderson.* 10 Q. B. D. 100.

In this case A. employed a commissioner to make bets

for him. The bets were made and A. lost. He then directed the commissioner not to pay the bets. As this course would have resulted in the commissioner's being posted at Tattersall's as a defaulter, he paid the bets notwithstanding, and sued his principal, who then pleaded the statute. *Held*, that a person may lawfully make a bet, and may lawfully pay the bet, and may authorise another person to pay it for him, and the money can be recovered from him. (*Rosewarne* v. *Billing*.) In *Bubb* v. *Yelverton*, Lord Romilly held that a request to bet *implied a promise to pay*. Such an authority, if coupled with an interest, such as his position at Tattersall's, cannot be revoked. (Per Hawkins, J.)

15 C. B. N. S. 316.
L. R. 9 Eq. 471.

In the Court of Appeal, Bowen, L.J., pointed out that this was not a wagering contract at all, but the plaintiff had been placed in a situation of pecuniary difficulty at the defendant's request, who *impliedly contracted to indemnify him*.

13 Q. B. D. 782, C. A.

In consequence of this decision, the **Gaming Act, 1892,** was passed, providing that—

55 Vict. c. 9.

'Any *promise, express or implied, to pay* any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward or otherwise, in respect of any such contract or of any services in relation thereto, or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.'

The result of this statute is that the case of *Read* v. *Anderson* would now be differently decided, for the plaintiff would not be able to recover on the implied promise. The case, however,

is still valuable as illustrating the nature of an 'authority coupled with an interest.'

But an effort, up to now successful, has recently been made to circumvent the Gaming Acts.

A. lost money to B. by betting, and gave B. a cheque for the amount. At the request of A. the cheque was held over and something paid on account. Then a fresh verbal agreement was made, under which, in consideration of B. holding over the cheque for a further time and not declaring A. a defaulter and injuring his credit with his customers, A. promised to pay the balance. The balance was not paid, and B. brought an action for it. *Held*, by Gorell Barnes, P., and Farwell, L.J. (Fletcher Moulton, L.J., dissenting), that these forbearances were a good consideration for the fresh agreement, and that the plaintiff could recover. (*Hyams* v. *Stuart King.*) 1908, 2 K. B. 696. (C. A.)

Illustrations.

(*a*) A. having lost money at a race meeting, asked his friend B. to settle his accounts. B. did so, and afterwards sued A. for the money. *Held*, that B. could not recover. (*Tatam* v. *Reeve.*) 1893, 1 Q. B. 44.

Nor does it seem to make any difference that B. is ignorant that it was a betting transaction, unless A. has represented that it is not such, in which case A. would probably be estopped from setting up the Act as a defence. (*S.C.*)

(*b*) A. employed a commissioner to bet; the winnings are paid to the commissioner. A. can recover them from him, as money paid to A.'s use. (*Bridger* v. *Savage.*) 15 Q. B. D. 363, C. A.

(*c*) A., who is a winner, if the stakeholder has hold of the money with express instructions to pay it over to him,

can recover it from him as money paid to A.'s use. (*De Mattos* v. *Benjamin.*)

1894, 63 L. J. Q. B. 248.

(*d*) A. and B. deposit their money with C., the stakeholder. At any moment, either before or after the determination of the event, either can claim his stake back, *provided it has not been paid over.* (*O'Sullivan* v. *Thomas,* and *Varney* v. *Hickman.*) But he must repudiate before payment. (See *Strachan* v. *Universal Stock Exchange Co.*) If, however, the money has been paid over without his consent being revoked, he cannot recover it from the winner. (*Howson* v. *Hancock.*)

1895, 1 Q. B. 698. 5 C. B. 271. 1895, 2 Q. B. 329. 6 T. R. 575.

(*e*) A. employed B., a commissioner, to make bets; B. failed to do so. As the bets would have been successful, A. sued B. for breach of duty as his agent. *Held,* that as the bets were not recoverable at law, A. could not maintain the action. (*Cohen* v. *Kittle.*)

32 Q. B. D. 680.

(*f*) Money lent in a foreign country, for the borrower to use at gaming, the game not being illegal in that country, can be recovered in this country, for the borrowing or lending of money for the purpose of gaming is neither immoral nor unlawful at common law. (*Saxby* v. *Fulton.*)

1909, 2 K. B. 208. (C. A.)

Among Stock Exchange transactions, agreements to pay differences, there being no real purchase of stock, come within the Act. (*Grizewood* v. *Blane.*) Nor does it affect the case that the arrangement is a bargain for differences plus an option to purchase. (*In re Gieve.*)

11 C. B. 526. 1899, 1 Q. B. 300, C. A.

It remains now to deal with **securities given for money lost on wagering contracts.**

The **Act 5 & 6 Will. IV. c. 41,** provides that securities of every kind, whether given for money lost in playing at **games,** including horseracing (*Woolf* v. *Hamilton*), or betting on the players, or

1898, 2 Q. B. 337, C. A.

knowingly advanced for such purposes should be taken to be given on an **illegal** consideration.

Securities given in respect of other lost wagers are given not on an illegal but on a **void consideration,** *i.e.* on no consideration, because the obligation to pay is not recognised by the law.

As between winner and loser, **if the security is under seal** it makes a difference whether it was given on an illegal or void consideration, for a deed is vitiated by the presence of an illegal consideration, but is good if there is no consideration at all.

If the security is a negotiable instrument, it does not matter, as between the winner and the loser, whether the consideration was void or illegal; the winner cannot sue on the document.

If, however, **the instrument gets into the hands of a third party,** the distinction becomes important. If the bill or note was given on a **void** consideration, a holder **for value** can sue on it as on an accommodation bill; but if it is proved that the consideration was **illegal,** the presumption that every holder is a *bonâ fide* holder for value disappears, and the burden of proof is shifted, unless and until the holder proves that subsequent to the alleged illegality, value has in good faith been given for the bill. (Bills of Exchange Act, 1882, § 30.)

A recent case should be noted:—

The defendant gave the plaintiff, in Algiers, a *cheque*

on an English Bank, partly for money lent to him to play baccarat with, partly to pay his gambling debts at the club. According to French law the consideration was good. *Held*, by Collins, M.R., and Cozens Hardy, L.J. (Fletcher Moulton, L.J., dissenting), that as the transaction was governed by English law the cheque was given for an illegal consideration within 5 & 6 Will. IV. c. 41, and that the action was not maintainable (*Moulis* v. *Owen*).

1907, 1 K. B. 746, C. A.

2 Burr. 1077.

The Court followed *Robinson* v. *Bland*, in which Lord Mansfield said that though as a general rule 'the place where a contract is made is to be considered in expounding a contract, that is not so when the parties at the time of making the contract have a view to a different kingdom. As the bill in the present case is made payable in England it is strictly an English transaction, and to be governed by the local law.'

'In pari delicto potior est conditio defendentis.'—Of two rogues it is better to be the defendant.

In an action to reclaim money paid for an unlawful purpose the Courts will give no assistance, not for the sake of the defendant, but because they will not help such a plaintiff. (Per Lord Mansfield, in *Holman* v. *Johnson.*) The test to apply is to consider whether the plaintiff can make out his case otherwise than by the aid of the illegal transaction to which he was a party. (*Taylor* v. *Chester.*)

Cowp. 341.

L. R. 4 Q. B. 309.

But the parties must be **in pari delicto.** This is not so if one party has been induced to enter on the illegal course by fraud or oppression of the other; it is not *par delictum* where one has

power to dictate, the other no alternative but to submit. (*Atkinson* v. *Denby.*) 7 H. & N. 934.

So, also, **before the illegal purpose has been carried out** the party who has paid may repent; he has a *locus paenitentiae*, and may get his money back. (*Taylor* v. *Bowers.*) But partial performance of the illegal purposes prevents recovery. (*Kearley* v. *Thomson*; and see *Scott* v. *Brown, Doering, McNab & Co.*) 1 Q. B. D. 291, C. A. 24 Q. B. D. 742. 1892, 2 Q. B. 724, C. A.

CHAPTER VIII

CONTRACTS OF ASSURANCE

The word 'wager' in its legal sense excludes policies of insurance (as marine, fire, and life), in which the assured has what is termed an 'insurable interest'.

The Marine Policy.—The object of marine insurance is to insure to those whose property is at risk an indemnity in the event of loss, and all property so at risk, except where public policy forbids, *e.g.* that of alien enemies, may be the subject of a contract of insurance. Such property comprises not merely ship and cargo, but freight, profit on goods, commission, loans on bottomry and respondentia, premium and costs of insurance.

The contract is thus one of indemnity, though not invariably a perfect one. There are such things as 'valued policies' as below (*Irving* v. *Manning*), and the policy 'one-third new for old', which is an arbitrary measure, which may exceed or fall short of the true loss sustained. (*Aitchison* v. *Lohre.*)

1 H. L. C. 287.

4 Ap. Cas. 755.

6 Ed. VII. c. 41.

The law on this topic is now contained in the Marine Insurance Act, 1906.

Every contract of marine insurance by way of gaining or wagering is void, and such is a contract where the assured has no insurable interest, and no expectation of one, or when the policy dispenses with proof of interest, *e.g.* by saying 'interest or no interest', or 'p.p.i.' (policy proof of interest), or 'full interest admitted'. (*Berridge* v. *Man On Insurance Co.*) 18 Q. B. D. 346, C. A.

'Every person has an insurable interest (subject to the provisions of the Act) who is interested in a marine adventure.' s. 5.

Speaking roughly, one has an interest in a thing when one has benefit from its existence, prejudice from its loss; so, if a man has a legal or equitable title to a ship or an enforceable security on her at law or equity, he may insure. But this is not the place for an exhaustive treatment of the subject.

The insurance may be for a particular voyage, a 'voyage policy', or for a certain period, a 'time policy', or it may be a 'mixed policy', *e.g.* 'at and from London to Cadiz for six months', but this sort is rare.

A higher measure of good faith is required from both parties than in ordinary contracts. Conditions are implied from the nature, and not from the words of the written contract, and terms are incorporated from the conversations of the parties, though appearing nowhere in the policy. When the shipowner gives the underwriter the information for him to form a judgment on, the under-

writer may require that part of it shall be embodied in the contract, *e.g.* that the policy shall describe the vessel as 'now in Lisbon'. Such are called 'express warranties'; the portions not inserted, if material to the risk, are 'representations'. And the contract of insurance consists of the written policy, including the express warranties, of the representations and also of certain implied warranties which are attached by law to these contracts, such as that of seaworthiness in a voyage policy, unless they are expressly agreed to be excluded.

If the assured fails to establish his right to recover, the question arises whether he is entitled to a return of his premium, and this depends on whether the risk had attached. If the risk has
s. 82–4. not been run, the premium is returned, but not if it has once commenced, unless the consideration for the payment of the promise is apportionable. But the assured cannot recover if he has been guilty of fraud, *e.g.* if he knew that the ship was
3 Burr. 1361. lost when he insured her. (And see *Wilson* v. *Ducket.*)

Right of subrogation. 'Where an insurer pays for a total loss . . . of the subject matter insured, he becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of
s. 79. the casualty causing the loss.'

Appended is an example of a valued voyage policy on cargo.

C.

This Policy is issued in the Form printed and supplied by the Government previous to 1*st August*, 1887.

S.G.

£[1000.]

(No.)

BE IT KNOWN THAT [*Messrs. X. & Y.* *and or* *as agents*], as well in [*their*] own name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance and cause [*themselves*] and them and every of them, to be insured, lost or not lost, at and from [*Cardiff, Penarth and Barry, to Malta*], upon any kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the ['*Beatrice*' *steamer*,] whereof is Master, under God for this present voyage, J. S., or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same Ship, or the Master thereof, is or shall be named or called, beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said ship [*at as above*] upon the said Ship, &c., and shall so continue and endure, during her Abode there, upon the said Ship, &c.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises whatsoever, shall be arrived at [*as above*] upon the said ship, &c., until she hath moored at Anchor Twenty-four Hours in good Safety, and upon the Goods and Merchandises until the same be there discharged and safely landed; and it shall be lawful for the said Ship, &c., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever, [*and wheresoever, par-*

ticularly at Lisbon, Gibraltar, and at any port or ports in the Mediterranean, in any order for any and all purposes, without being deemed a deviation, and] without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured, by Agreement between the Assured and Assurers in this Policy, are and shall be valued at [£1000 *on Coals so valued*].

TOUCHING the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-war, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at sea, Arrests, Restraints and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises and Ship, &c., or any Part thereof; and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labour, and travel for, in, and about the Defence, Safeguard and Recovery of the said Goods and Merchandises and Ship, &c., or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his sum herein assured. And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the Assurers are contented, and

do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured at and after the Rate of seven shillings and sixpence per cent.

In witness whereof, we the assurers have subscribed our names and sums assured in [*London, 27th September*, 1890].

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent.; and all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general, or the ship be stranded [*sunk or burnt*].

£110	E. R.	per H. M., one hundred and ten pounds each. [27 *Dec.*, 1890.]
£110	J. C.	
£110	A. W.	
£110	B. F.	
£110	H. M.	
£90	J. M.	per G. K. M., ninety pounds each. [27 *Dec.*, 1890.]
£90	C. T.	
£90	G. K. M.	
£90	W. C.	
£90	R. B.	

Fire Insurance Policy.—By 14 Geo. III. c. 48, the person effecting the insurance must have an interest in the property insured, and he cannot recover beyond his interest. He must communicate all material facts, and should his house be insured, he must not alter it so as to increase the risk. This is a contract of indemnity.

Illustration.

The roller of the Brighton Corporation broke the gas pipes in a street and caused an explosion in a house. The Corporation paid compensation to the tenant, who repaired the damage as his lease required. The landlord, who had insured with the plaintiffs against gas explosions, was paid by the plaintiffs, who were ignorant that the damage had been made good *aliunde*. On learning the facts they claimed a return of the money, and succeeded, because the policy was a contract of indemnity, and the landlord's contention was that he should be paid twice over. (*Darrell* v. *Tibbitts.*)

5 Q. B. D. 560.

'Subrogation' is the right possessed by the insurer of property against risks of loss or damage, whereby he may put himself in the place of the assured for the purpose of enforcing rights of action and of availing himself of every right of the assured, whereby the loss can be or has been diminished, and whereby he may recover from the assured moneys which the assured has received or is entitled to receive in respect of that loss. (See *Castellain* v. *Preston.*)

11 Q. B. D. 380, C. A.

Illustration.

A vendor contracted with a purchaser for the sale at a specified sum of a house which had been insured by the vendor with an insurance company against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date of completion, the house was damaged by fire, and the vendor received the insurance money from the company. On completion

of the purchase, the vendor received the full purchase-money without abatement. *Held*, that the company were entitled to recover a sum equal to the insurance money from the vendor for their own benefit. (*Castellain* v. *Preston*.)

The Life Policy.—This differs from the other two in that *it is not a contract of indemnity*. The exact sum insured for may be recovered, though it may be in excess of the actual loss. But the person for whose benefit the policy is effected must have an interest in the life insured at the time of effecting the insurance. (14 Geo. III. c. 48, § 1.)

Generally this interest is of a pecuniary character (see *per* Lord Tenterden, in *Halford* v. *Kymer*), in which case, an insurance by a father in his own name on the life of his son, he having no pecuniary interest in it, was held void. The Act, however, does not prevent a man insuring his own life. A creditor may insure his debtor's life, and **though the debt is subsequently paid** may recover the money (*Anderson* v. *Edie*), but not a debtor the life of his creditor (*Hebdon* v. *West*); a wife her husband's, or a husband his wife's (*Huckman* v. *Fernie*); and see the Married Women's Property Act, 1882, § 11.

10 B. & C. 724.

2 Park, Ins. 914.
3 B. & S. 579.

3 M. & W. 505.

By section 2 of the Act, the name of the person interested in the policy, or for whose benefit the policy is made, is to be inserted.

By section 3, where the assured has an interest, no greater sum shall be recovered from the

insurers than the value of that interest at the date of the policy. (*Hebdon* v. *West.*)

8 B. & S. 579.

A life policy may be assigned on written notice being given to the insurer; it is not necessary that the assignee should have any interest, or even that he should have paid any consideration. He stands on the rights of the party who effected the insurance. (*Ashley* v. *Ashley.*)

3 Sim. 149.

> 'The contract commonly called "life assurance", when properly considered, is a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life, and when once fixed it is constant and invariable. . . . This species of insurance in no way resembles a contract of indemnity.'

15 C. B. 365. (Per Baron Parke, in *Dalby* v. *India and London Life Assurance Co.*)

The person whose life is insured has usually to answer certain questions. If it is a condition in the policy that these shall be answered truly, any error, material or not, vitiates the policy. If not a condition, it depends on the materiality of the question. (*London Assurance Co.* v. *Mansel.*)

11 Ch. D. 363.

Apart from any conditions expressed in the policy, it is vitiated by felonious suicide, death in a duel, or execution of the assured. (*Amicable Society* v. *Bolland.*)

4 Bl. N. S. 194.

CHAPTER IX

DISCHARGE OF CONTRACTS

CONTRACTS may be discharged by Agreement, Performance, Impossibility, Breach, and Operation of Law.

By agreement.

i. Rescission.

As agreement makes, so agreement unmakes a contract. This is Rescission, which is properly speaking the act of **both** parties.

The agreement may take the form of a **release.** If A. and B. have made a contract, and neither have done his part, *i.e.* there is promise outstanding against promise, the release of A. is the consideration for the release of B.

If, however, A. has already performed his part, and his right of action has accrued (*Edwards* v. *Chapman*), or B. has committed a breach, the release must be supported by a new consideration, which if 'executed' is termed an **accord and satisfaction,** or the release must be under seal. (*Foster* v. *Dawber.*)

1 M. & W. 231.

6 Ex. 839.

But note that the holder of a bill of exchange or a promissory note may waive his rights, if he do

45 & 46 Vict. c. 61, § 62. so in writing or delivers the bill or note up to the acceptor, though he get no consideration.

ii. Alteration or substitution.

As you can agree to rescind, so you can agree to alter, or to substitute a new contract. Agreement is a matter of fact, and may be inferred from the conduct of the parties, *e.g.* from their making a new contract inconsistent with the old. But a mere giving time on request does not operate as a substitution, but only permits delay at the risk of the person making the request.

At Common Law, if the original contract was under seal it could be discharged or altered only by deed. (*West* v. *Blakeway.*)

2 M. & G. 729.

In equity the mere form of the agreement was not regarded; a valid parol agreement was formerly good ground for an injunction to restrain an action upon the original deed in breach of the subsequent agreement; and now under the Judicature Act of 1873 such an agreement may be pleaded directly in answer to any proceeding upon the original deed, instrument, or contract brought contrary to the terms and faith of the agreement; *the ancient technical rule of the Common Law that a contract under seal cannot be varied or discharged by a parol agreement is thus practically superseded.*

This, however, only means that a defendant can avail himself of the parol agreement as a defence against an action on the original contract. He will not be entitled to bring an action on the

agreement as altered unless the agreement as altered is in the form required by law.

So if the original contract was required by law to be in writing, any alterations must be in writing. (*Goss* v. *Lord Nugent.*) 5 B. & Ad. 58.

If the Statute of Frauds requires a contract to be evidenced by writing and signature, a new agreement altering the terms or discharging it in part is also within the statute and must satisfy the statutory requirements. (*S.C.*)

If the original contract, though in writing, need not have been, the alterations need not be. (*S.C.*)

If the parties agree that on the occurrence of certain circumstances the agreement shall come to an end, the occurrence is a good defence. Thus in a charter-party the 'excepted risks' excuse, and in contracts with carriers excusal is implied on the ground of act of God, King's enemies, and the 'proper vice' or 'inherent defect' of the thing carried. (*Blower* v. *G.W.R.*) L. R. 7 C. P. 655.

By performance.

When both parties have done what they originally agreed to do, the contract is at an end, and discharged.

An alteration of the performance at the request of the other party may be equivalent to the performance originally agreed on, so far as to preclude the latter party from objecting to its sufficiency, *e.g.* a request for delivery of goods at a different

place from that originally agreed. (*Leather Cloth Co.* v. *Hieronymus.*)

L. R. 10, Q. B. 140.

After performance is due, and a right of action has accrued, a substituted performance, usually a payment of money, may be accepted by the party entitled, which if so agreed may discharge the liability by way of 'accord and satisfaction'.

Tender.

In all contracts where one party is bound to deliver goods or to pay money to another, he cannot completely perform without the concurrence of that other. Without acceptance from that other, his act can only amount to a **tender** of delivery or payment respectively.

Note, however, a distinction.

A contract **to deliver goods** is completely discharged by tendering the goods for acceptance, according to the contract, and if the goods are refused they need not be offered again, and the seller is discharged, and can bring an action for non-acceptance, or defend an action for non-delivery.

56 & 57 Vict. c. 76, § 37.

But **where a sum of money is due,** tender by the debtor, if refused, does not operate as a discharge. The debtor must remain ready and willing to pay, and if sued must pay the money into Court, and plead the tender, which is then a good defence.

Tender of payment to be efficacious may be of a larger sum than the debt, but must be such that the creditor may take his money without giving change. The money must be actually produced,

unless the creditor expressly or impliedly dispenses with production. (*Finch* v. *Brook*, and *Leatherdale* v. *Sweepstone*.) 1 Bing. N. C. 253. 3 C. & P. 342.

By statute, gold is legal tender to any amount, silver up to 40*s*., bronze up to 1*s*. 33 Vict. c. 10.

Bank of England notes are legal tender for £5, and any sum over, but as they are merely promises to pay, the Bank of England cannot pay its debts in its own paper if the payee objects. 3 & 4 Will. IV. c. 98.

The Crown by Proclamation can make the gold coinage of a colony legal tender through any portion of its Dominions. 33 Vict. c. 10.

Payment of a debt by cheque or other negotiable instrument, *e.g.* country bank notes, is, unless there be clear agreement, not absolute payment but payment conditional on the instrument being honoured. (*Robinson* v. *Read*, and see also *Day* v. *McLea*.) 9 B. & C. 449. 22 Q. B. D. 610.

By impossibility arising subsequent to the making of the contract.

As a general rule, a party is not discharged from a contract that he himself has made, by reason of subsequent impossibility, because in making the contract he might have guarded himself against such accidents. (*The Moorcock*.) 14 P. D. 64.

Thus charter-parties are usually drawn with a protective clause such as 'act of God, restraints of princes and rulers, the King's enemies, fire, dangers and accidents of the seas, rivers, and navigation always excepted', and a charterer having

contracted to provide a full cargo of coal, will usually protect himself by a 'strike clause'.

The following case may be noticed :—

A. let to B. a seam of coal for a term of years, at an annual rent, and until the working began at a nominal rent of £5 a year. B. covenanted to fairly, honestly, and duly work and get the whole of the seam. After incurring great expense B. found it impossible to work the coal without heavy loss, and prudently discontinued operations. *Held*, that he had broken his covenant and was liable in damages. (*Charlesworth* v. *Watson*.)

1906, A. C. 14.

But in three cases subsequent impossibility will afford a good defence.

(i.) Where the impossibility arises from a change in the law of our own country: for persons are taken to contract with reference to the law existing at the time.

Illustrations.

A. gave a long lease of land to B., covenanting as lessor that neither he nor his assigns would erect on the adjacent land which he retained any but ornamental buildings. A railway company under parliamentary powers took the land A. kept and built a railway station thereon. *Held*, that the lessor was discharged from his covenant. (*Baily* v. *De Crespigny*.)

L. R. 4 Q. B. 180.

So also the force of a declaration of war is equal to that of an Act of Parliament in this regard, for it makes acts of trading with the enemy illegal. (*Esposito* v. *Bowden*.)

7 E. & B. 763.

(ii.) When the contract relates to a specific thing and cannot, as the parties know, be fulfilled,

unless the specific thing continues to exist, it is usually subject to the implied condition of the continued existence of the thing. If the thing perishes without the fault of either party the contract is at an end.

Illustrations.

(*a*) A. agreed to let his hall to B. for some public entertainments; before the date of the first entertainment the hall was destroyed by an accidental fire. This was held to discharge both parties. (*Taylor* v. *Caldwell.*) And see *Nickoll and Knight* v. *Ashton, Edridge & Co.*, and § 7 of the Sale of Goods Act. 3 B. & S. 826. 1901, 2 K. B. 126, C. A. 56 & 57 Vict. c. 71.

(*b*) The defendants, who were brewers, agreed to sell and the plaintiffs agreed to buy all the grains made by the defendants for ten years. After five years the defendants sold their business and so ceased to make grains. In an action by plaintiffs, *held*, that there was no implied contract that the defendants would not by some voluntary act prevent themselves from carrying on sales. Judgment for the defendants. (*Hamlyn & Co.* v. *Wood & Co.*) And see *Turner* v. *Goldsmith.* 1891, 2 Q. B. 488, C. A. 1891, 1 Q. A. 544, C. B.

So where there is an agreement which is based on the assumption by both parties that a certain event will in the future take place, and that event is the foundation of the contract, and through no default in either party, and owing to circumstances not in the contemplation of the parties when the agreement was made, it happens that before the time fixed for the event, it is ascertained that it cannot take place, the parties are both discharged from any further performance, but unless

the contract can be treated as rescinded *ab initio*, any payment previously made or right accrued will not be disturbed. (Per Romer, L.J., in *Chandler* v. *Webster*.)

1904, 1 K. B. 493, C. A.

Illustration.

The defendant agreed to let his rooms to the plaintiff to see the Coronation procession, 1902, for £141 15*s*. *The price was to be paid in advance.* The plaintiff paid £100 on account. The King fell ill, and the Coronation was put off. The plaintiff sued for return of his £100, the defendant sued for the balance of £41 15*s*. Judgment in both cases for the defendant. (*Chandler* v. *Webster*.)

From the other so-called 'Coronation cases', where rooms were hired or steamer chartered to see the show, the law may be collected as follows:— If the sole basis of the contract was either expressly or by necessary inference, the happening of the procession or the naval review, the postponement cut the contract short, leaving the parties in the position it found them at the moment, viz. no further payment to be made on the one side, on the other, no return of payments, if any, already made on account. (*Krell* v. *Henry*, and *Civil Service Co-operative Society* v. *General Steam Navigation Co.*)

1903, 2 K. B. 740, C. A.

1903, 2 K. B. 756, C. A.

If, however, the object was twofold, as to see the review and cruise round the fleet for a day, then, as the fleet remained there, although the review was postponed, there was no total failure

of consideration, and the agreed hire is payable. (*Herne Bay Steamboat Co.* v. *Hutton.*) 1903, 2 K. B. 683, C. A.

(iii.) Contracts for personal service are, unless the contrary clearly appears, conditional on the continuance of the ability, mental and corporeal, to perform them.

Illustrations.

A., an eminent artist, contracts to play the piano at a concert, but is incapacitated by illness. *Held,* a good defence, for no deputy could perform, nor in case of death could the executors. (*Robinson* v. *Davison.*) L. R. 6 Ex. 269.

So with regard to a promise of marriage, death excuses, and an action for breach of the promise cannot be brought against the executors. In the case, however, of *Hall* v. *Wright* it was held, by four judges of the Exchequer Chamber to three, that a disorder causing bleeding from the lungs, though it might make marriage extremely imprudent, yet did not make it impossible: Lord Campbell observing (at p. 763) that a lady might innocently desire *consortium vitae* with him, as she might with a mutilated person, might obtain rank and station thereby, and *as his widow* become dowable out of his lands. It seems, however, that, had the lady chosen, she might have declined to proceed further. (See *Atchinson* v. *Baker.*) E. B. & E. 765. Peake, Ad. Cas. 103.

Acts of God—by which term is meant some natural accident which it is practically impossible to foresee or guard against, as an extraordinary storm (*Nugent* v. *Smith*)—will not, however, discharge other contracts unless it can be inferred from the terms of the contract that such was the 1 C. P. D. 423.

intention of the parties, for it is open to the parties to contract not absolutely but conditionally.

By breach.

When a party to a contract breaks his agreement, the injured party has always a right of action for damages.

But it is not in every case that he is entitled to throw up his part of the contract and treat it as at an end. In other words, it is not every breach that discharges the contract.

B. may decline to go on, and is excused from going on when the conduct of A. is such that it amounts to a renunciation or an absolute refusal to perform the contract. The true question is whether the conduct of A. evinces an intention to be no longer bound.

If A. says in effect, 'You may go on and perform your part, but I will not perform mine' (*Withers* v. *Reynolds*), B. may say, 'That is good enough notice, I will not go on', and he **may, though he need not,** treat the contract as at an end and immediately sue for the breach. (*Hochster* v. *De la Tour*, and *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.*)

2 B. & Ad. 882.

2 E. & B. 678.
9 Ap. Cas. 434.

Illustrations.

(*a*) The defendant engaged the plaintiff as a courier at £10 a month, the service beginning on 1st June. Before that day he informed the plaintiff that he should not require him: and before that day the plaintiff took proceedings. *Held*, that the plaintiff's right of action

accrued immediately on the receipt of the explicit renunciation, and that he was not bound to wait till 1st June. (*Hochster* v. *De la Tour.*)

(*b*) A. promised B. that he would marry her when his father died. In the lifetime of his father he explicitly withdrew his promise. *Held*, that B. could immediately bring her action without waiting for the father's death. (*Frost* v. *Knight.*) L. R. 7 Ex. 111.

A.'s conduct may vary; he may, as above, explicitly renounce, or he may by his conduct make it impossible to carry out the contract.

Illustration.

A. promises to marry B. on 10th May. On 1st April he marries C. B. can immediately bring her action, and need not wait till 10th May. (*Short* v. *Stone.*) 8 Q. B. 358.

In the above cases the renunciation or impossibility has occurred before the time for performance: it may occur in the course of performance.

Illustrations.

(*a*) The plaintiff contracted with a railway company to supply a certain quantity of 'chairs' at a certain price. He delivered about half, when the company gave him notice that they would take no more. *Held*, that this express renunciation relieved the plaintiff from tendering the balance, and entitled him to forthwith sue the company for breach of contract (*Cort* v. *Ambergate Ry. Co.*); 17 Q. B. 127. and see also *Planché* v. *Colburn*, where the defendants 8 Bing. 14. made the performance of the contract impossible, and *Ogden's, Limited* v. *Nelson.* 1905, A. C. 109.

(*b*) A firm agreed with their manager that he should hold office subject to twelve months' notice on either side, with a restriction on his right to trade after he left their employment. The firm wrongfully dismissed him without notice. *Held*, that he was entitled to treat this as a repudiation of the contract, could sue for damages, and was not bound by the restraint. (*General Billposting Co.* v. *Atkinson.*)

1909, A. C. 118.

In the cases above mentioned it has been plain that the one party, whom we will call A., either would not or could not do his part or any of it.

But if A. fails to carry out some of his part, and yet the contract is not thereby made incapable of performance, and A. does not decline to go on, under what conditions is B. (*a*) entitled to his discharge or (*b*) bound to content himself with going on and claiming damages for the breach?

The answer to this depends on whether the two performances are concurrent conditions, and this is a question of the intention of the parties.

The promises **may** be independent; thus—

'If a time is fixed for payment and none for doing that which is the consideration for the payment, an action lies for the purchase-money without averring performance.' (*Mattock* v. *Kinglake.*)

10 A. & E. 50.

Where they are independent, non-performance by one will not release the other.

As a rule, however, when each promise forms the whole consideration for the other, they will hardly be taken to be independent unless there is

clear evidence that the parties so intended. (*Glazebrook* v. *Woodrow.*) 8 T. R. 366.

It may be that there is a variety of terms in the contract and one of them has been broken. Does this breach discharge the contract? The answer depends on whether the term was of such importance as to go to the root of the contract.

Illustration.

Plaintiff contracted with the Italian Opera, one of the terms being that he was to be in London six days at least before the performance, to rehearse. He appeared two days before, whereupon the defendant threw up the contract. *Held*, that this term was not in the nature of a condition precedent, that it did not go to the root of the contract, but was proper for damages. (*Bettini* v. *Gye.*) 1 Q. B. D. 183.

The 'quantum meruit'.

When a person has done work or services for another, and no price has been agreed, the Court or jury assess the value at the usual or reasonable rate of remuneration on the assumption that this was the intention of the parties. This value is called a *quantum meruit* for work and services. It may, however, be that A. has agreed to do certain services for B. for a certain price, and that after A. has done some of his part, B. renounces or makes it impossible for A. to complete. The contract is then at an end, and A. can sue B. for damages for the breach, and also on a

quantum meruit, i.e. on a new implied contract for the value of the work he has already done.

The position of the parties is, however, materially affected by the question whether the contract is 'entire' or 'divisible'. If A. agrees with B. to do a definite job for a lump sum, that is, as a rule, an 'entire' contract, and till the job is done no money is owing; either all is due or nothing. No question can arise of a *quantum meruit.* Each consideration is a whole and cannot be divided. Thus if I take a cab to carry me from Piccadilly to Paddington, and the driver stops at Marble Arch and will go no further, he has no claim on me for the distance he has driven me; on the contrary, he would be liable in damages for his breach.

Illustrations.

(*a*) Cutter was engaged for a lump sum of 30 guineas to serve as mate on a voyage from Jamaica to Liverpool. He died after two-thirds of the voyage. As he had not completed his contract, the 30 guineas were not owing. His executors, however, claimed that payment was due for what he had done up to the time of death. *Held,* that it was an entire contract and could not be apportioned. (*Cutter* v. *Powell.*)

6 T. R. 320.

(*b*) A. contracts to make B.'s chandeliers complete for £10, but only does half. He can recover nothing. (*Sinclair* v. *Bowles.*)

9 B. & C. 92.

Where plaintiffs have contracted to do an entire work for a specified sum, they can recover nothing unless—

i. the work be done;

Or ii. it was the defendant's fault that the work could not be completed;

Or iii. there is something to justify the conclusion that the parties have entered into a fresh contract. (Per Blackburn, J., in *Appleby* v. *Myers*.) L. R. 2 C. P. 651.

This judgment was quoted with approval in the following case:—

The Japanese Government purchased in this country a warship which was placed in charge of a captain to navigate on their behalf from the Tyne to Yokohama. The plaintiff contracted with the captain to serve as one of the crew *for the voyage for a fixed sum*. On the arrival of the ship at Aden, they heard that Japan had declared war on China. The plaintiff then refused to continue, and left the ship and brought an action for the whole lump sum. The declaration of war not only exposed the plaintiff to the penalties of the Foreign Enlistment Act, but altered materially the risks of the voyage he had undertaken. It was also uncontradicted that at Aden the captain said that the run was ended and that they (the crew) might go on by the month. *Held*, that the plaintiff was right, that the captain was the agent of the Japanese Government and was bound by their actions, that as his principals had declared war, *they had altered the risks that the plaintiff had contracted to run*, and so the contract could not be completed in its original terms, and therefore the plaintiff had a right to the stipulated sum. He satisfied both conditions ii. and iii. laid down by Blackburn, J. (*O'Neill* v. *Armstrong, Mitchell & Co.*). 1895, 2 Q. B. 418.

So when a sailor signed on for an ordinary trading voyage out to the East and back at £5 a month: the ship

carried contraband, a fact unknown to the sailor though known to the captain, was seized and condemned as prize. The crew were sent back to London and suffered hardships. *Held*, that as the shipowners broke the agreement by altering the character of the voyage, the sailor could recover his wages up to his arrival in London and damages for breach of contract. (*Austin Friars S. S. Co.* v. *Strack.*)

1905, 2 K. B. 315.

Whether a contract is divisible or entire depends on the nature and circumstances of the case. As Lord Ellenborough said in *Ritchie* v. *Atkinson*, you must 'consider the reason and sense of the thing as it is to be collected from the whole contract.'

10 East, 295.

Illustrations.

(*a*) This was a promise to load a complete cargo and deliver the same on being paid freight at specific rates. The plaintiff came away with his cargo incomplete under fear of an embargo, and the defendant declined to pay anything. *Held*, by Lord Ellenborough, that the loading a complete cargo was not a condition precedent, but that delivery of cargo is in its nature divisible. The defendant was accordingly left to his remedy in damages for the short delivery. (*Ritchie* v. *Atkinson.*)

(*b*) So a contract to deliver by instalments has been held to be divisible (*Simpson* v. *Crippin*), in which case a failure to accept the whole of the first instalment was held not to justify repudiation, and see also *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.*

L. R. 8 Q. B. 14.

9 Ap. Cas. 434.

This, it must be noticed, is not a rule of law, for other 'instalment' cases have been decided

differently. (*Hoare* v. *Rennie.*) Whether any particular 'instalment' contract is divisible or not, depends on the terms of the contract and the circumstances of the case. So by the Sale of Goods Act, § 31, these considerations determine whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation, but not entitling the party to treat the whole contract as repudiated. 5 H. & N. 19.

Illustration.

A shipwright undertook to put a ship in 'thorough repair', no mention being made *of the amount or time of payment.* He began, and then asked to be paid for what he had done else he would not proceed. *Held,* that there was no special agreement taking this out of the general employment of a shipwright, and that he had not bound himself to do the whole work before he asked for payment. (*Roberts* v. *Havelock.*) 3 B. & Ad. 404.

Difficulties of this sort are avoided by special arrangements being made for payment by instalment, especially where, as in large building contracts, the builder cannot wait till the end for payment, and the employer wishes to be sure that the work is satisfactory before paying. In such a case it is customary to arrange for payment by instalments, the production of the architect's certificate being a condition precedent to payment.

By operation of law.

Merger.—This is the substitution or acceptance of a security which in the eye of the law is of a higher operative value, in place of another. Thus a parol contract may be merged in a specialty, if the parties embody their existing contract in a deed, and both are merged in a judgment, if action is brought on the parol contract or the deed, and judgment is recorded thereon. In the latter case, if the loser made default in satisfying the judgment, the winner would sue not on the original contract but on the judgment.

Bankruptcy.—Of this it need only be said that an order of discharge releases the debtor from all debts provable under the Bankruptcy, whether in fact proved or not.

Alteration of a written instrument. An alteration by way of addition or erasure, in a material part discharges the instrument, whether specialty or parol, unless it was made by mistake. (*Wilkinson* v. *Johnson.*)

3 B. & C. 428.

Such alteration must be without the consent of the other party, else there would be a new contract, when the Stamp Act might require to be considered, and the alteration must be made by one party, or by a stranger while the instrument is in the said party's control, and for his benefit.

An alteration is said to be in a material part when it makes the operation of the instrument different.

Illustrations.

(*a*) A. drew a bill of exchange on X., payable three months after date, viz. 26th March, to B., X. accepted it, and B., having first altered 26th March into 20th March, thus accelerating the day of payment, endorsed it to the plaintiff, who sued X. *Held*, that the unauthorised alteration being material, destroyed the instrument. (*Master* v. *Miller*.) 2 H. & L. 241.

(*b*) The defendant gave a promissory note to this effect, 'I promise to pay Mr. Edward Aldous the sum of £125.' When presented for payment the words 'on demand' had been added. *Held*, that this was immaterial, all notes which express no time for payment being payable on demand. (*Aldous* v. *Cornwell*.) L. R. 3. Q. B. 573.

So in *Suffell* v. *Bank of England* an alteration in the number of a Bank of England note was held to be fatal, such being held a material part of the instrument for business purposes. 9 Q. B. D. 555.

The doctrine has been applied to deeds (*Pigot's case*), bought and sold notes (*Powell* v. *Divett*), a charter-party (*Crookwit* v. *Fletcher*), &c. 11 Co. 26. 15 East, 29. 26 L. J. Ex. 153.

As regards bills of exchange,

'Where a Bill or Acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers.

'Provided that,

'Where a bill has been materially altered but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce

payment of it *according to its original tenor.*' And see *Scholfield* v. *Lord Londesborough*, on a point of estoppel.

45 & 46 Vict. c. 61, § 61.

It has been held that the provisions of this Act do not apply to Bank of England notes. (*Leeds Bank* v. *Walker.*)

1896, Ap. Cas. 514. 11 Q. B. D. 84.

The loss of a written instrument deprives the party of evidence, which may be a serious matter. With regard, however, to Bills and Notes the Act of 1882 provides that if the holder of a bill loses it before it is overdue he can compel the drawer to give him a duplicate on giving him an indemnity in case the lost bill should be found (§ 69), and that if a proper indemnity be given against the claims of any other person upon the bill, the Court may order that the loss shall not be set up as a defence to an action on the bill (§ 70).

The same rule applies with regard to Bank Notes. (*McDonnell* v. *Murray*, and *Noble* v. *Bank of England.*)

9 Ir. C. L. R. 495. 2 H. & C. 955.

Statutes of Limitation.

It is not correct to say that the Statutes of Limitation operate to discharge or extinguish a debt or contract. What they do is to afford an absolute bar to an action brought outside the prescribed time limit, if, but only if, the debtor chooses to plead the statute. If he does not, the law regards the obligation as still valid. Thus an

executor can, if he chooses, pay a barred debt, and charge it against the personal estate of the deceased, and if that is deficient, against the real estate. (*Lowis* v. *Rumney.*) L. R. 4 Eq. 451.

Simple contract.- By the Limitation Act, 1623, § 3— 21 Jac. I. c. 16.

'Actions of account and upon the case . . . all actions for debt grounded upon any lending or contract without specialty, all actions for debt for arrearages of rent shall be commenced and sued within six years next after the cause of such actions of suit, and not after.'

This section applies to all actions of debt by simple contract, notwithstanding the debt is also secured by a charge upon land. (*Barnes* v. *Glenton.*) 1889, 1 Q. B. 985.

Specialties.—By the Civil Procedure Act, 1833, § 3— 3 & 4 Will. IV. c. 42.

'All actions of covenant or debt on any bond or other specialty shall be commenced and sued . . . within twenty years after the cause of such actions or suits, but not after.'

Money charged upon land.—By the Real Property Limitation Act, 1874, §§ 8 and 9— 37 & 38 Vict. c. 57.

'No action or suit . . . shall be brought to recover any sum of money secured by any mortgage judgment or lien or otherwise charged upon or payable out of any land or rent at law or in equity . . . but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge or a release of the same, unless in the mean time some part

of the principal money, or some interest thereon, shall have been paid or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent.'

The limitation imposed by this last Act applies to the personal remedy on the covenant in the mortgage deed as well as to the remedy against the land. An action by the mortgagee, though on the covenant, is none the less an action to recover money charged on land. (*Sutton* v. *Sutton.*)

22 Ch. D. 511, C. A. 22 Ch. D. 579.

Fry, L.J., in *Fearnside* v. *Flint*, extended the rule to a collateral bond given by the mortgagor, for to hold otherwise would be to give an instrument a different effect because it was not on the same sheet of paper. (Per Bowen, L.J., in *In re Powers, Lindsell* v. *Philips.*)

30 Ch. D. 297, C. A.

Illustration.

The defendants mortgaged to the plaintiff their reversionary interest in the real estate devised under the will of A., a testatrix, to secure advances. The mortgage deed contained a joint and several covenant to repay the loan with interest. More than twelve years and less than twenty years after the last payment of interest or acknowledgment by the defendants, the plaintiff brought his action to recover the amount of principal and interest due under the covenant. A., the testatrix, was still living at the time of the action. *Held*, that the money payable under the covenant was ' money charged upon or payable out of land ' within the meaning of the Act of 1874 and that the limitation of twelve years applied, though

the subject-matter of the mortgage was a reversion, and a reversion which had not fallen in at the date of the action. (*Kirkland* v. *Peatfield.*) 1903, 1 K. B. 756.

Though the statutes begin to take effect as soon as the cause of action arises, yet their operation may be suspended. By the joint effect of the Limitation Act, 1623, the Civil Procedure Act, 1833, and the Mercantile Law Amendment Act, 1856, the infancy, coverture or insanity of the plaintiff, if existing when the action arises, suspends the operation of the statutes as regards both simple contract and specialty, till the disability is removed, when the statutes begin to run.

If the defendant is beyond the seas when the action arises, the operation is suspended till he returns. 4 Anne, c. 16, §. 19. 3 & 4 Will. IV. c. 42, § 4.

When once the statute has begun to run, a disability supervening will not stop or suspend it.

The plaintiff's ignorance of his right is immaterial. But if the ignorance is produced by the fraud of the defendant, the statute does not run against the plaintiff until discovery of the fraud, or till such discovery can be reasonably imputed to him. (*Gibbs* v. *Guild.*) 9 Q. B. D. 59, C. A.

Revival of Claims for Debt.

Liability for *debt*, whether by specialty or simple contract, may be revived, with the effect of taking the case out of the statute and renewing the time

of limitation. This may be done by an acknowledgment or promise in writing signed by the debtor or his duly authorised agent, by part payment of the debt, if made under circumstances from which a promise to pay the remainder may be inferred, or by payment of interest. This is permitted as to specialties by the Civil Procedure Act, 1833, and as to simple contracts by Lord Tenterden's Act, 1828, and the Mercantile Law Amendment Act, 1856.

3 & 4 Will. IV. c. 42.

9 Geo. IV. c. 14.

19 & 20 Vict. c. 97.

In *a simple contract debt*, an unconditional acknowledgment need not contain an explicit promise to pay. The promise may be inferred; unless there is coupled with the acknowledgment a refusal to pay, or a conditional or limited promise, so as to negative the inference of an unconditional promise.

Illustrations.

(*a*) A. owed B. £210, and after the Statute of Limitations had run wrote to B.'s solicitors, 'I admit I owe your client £210, but I cannot meet this liability at the moment, though I hope to call on you within 14 days to make a definite proposal for repayment with interest.' *Held*, that there was a sufficient acknowledgment to take the case out of the statute. (*Cooper* v. *Kendall.*)

1909, 1 K. B. 405, C. A.

(*b*) A. owes B. a debt and gives him a cheque for £20 in part payment on May 10, 1900. B. agrees not to present it till June 20, when it is duly paid. On June 18, 1906, B.'s executors issued a writ for the balance. *Held*, that the statute ran from May 10, 1900. (*Marreco* v. *Richardson.*) If, however, the debtor wrote, 'I know I owe

1908, 2 K. B. 584, C. A.

you £10, but you are much mistaken if you think I am going to pay', or gave his creditor a £5 note, saying, 'Take that; it's all you'll get', that would not be enough. (*Marreco* v. *Richardson*, per Fletcher Moulton, L.J.) Nor would an acknowledgment expressly made 'without prejudice'. (*Cory* v. *Bretton*.) 4 C. & P. 462.

But the acknowledgment provided for by 3 & 4 Will. IV. c. 42, in order to take *a specialty debt* out of the operation of that statute, need not be made by the person chargeable, *to the person entitled*, or *amount to a promise to pay*. Thus, it was held in *Moodie* v. *Bannister* that an admission 4 Drew. 432. of a bond debt contained in the answer of the executors of the obligor in a suit to which the obligee was not a party, was sufficient to take the bond debt out of the operation of the statute.

CHAPTER X

REMEDIES

For a breach of contract both Common Law and Equity provided remedies. Common Law gave an action for **damages,**[1] Equity an action for **specific performance** or claim for an **injunction.**

Damages are either **general** or **special:** general, those which are caused by the breach, irrespective of special circumstances, *e.g.* the deprivation of goods caused by failure to deliver under a contract;

[1] In certain cases the damages awarded may be **nominal** or **exemplary.** Nominal damages are given when, though there has been a breach of contract, no appreciable damage has been sustained, or where, if the injury is independent of contract, the plaintiff states that the real object of his action is to get a legal decision as to his rights, *e.g.* to establish his title to land, or to vindicate his character. If, however, in an action for defamation, the jury give nominal damages because they consider the plaintiff's character worth no more, these damages are called 'contemptuous'.

Exemplary damages are given not merely to compensate the plaintiff, but to mark indignation at the defendant's conduct. Though not uncommon in actions of tort, they are not given for breaches of contract except in cases where a breach of promise to marry has been aggravated by seduction.

special being for the further consequences caused by the breach occurring under special circumstances, *e.g.* the loss caused by failure to deliver goods under a contract to deliver for a special purpose.

With regard to **general** damages, the measure is that the plaintiff is to be put, 'so far as money can do it, in the same situation as if the contract had been performed.'

General damages are restricted to the natural and ordinary consequences of the breach complained of, *i.e.* such as might be considered as arising according to the usual course of things from such a breach.

If, however, there are special circumstances present which will inflame the damages, it is necessary that notice of these circumstances be given to the party sought to be made liable, and even if notice be given he is not liable for the special damages unless it appears or can be implied that the contract was made upon the basis of these circumstances. Otherwise these damages are said to be 'too remote'.

These rules are usually considered deducible from the case of *Hadley* v. *Baxendale*, qualified by the judgment in *Horne* v. *Midland Ry. Co.* 9 Ex. 341. L. R. 8 C. P. 131.

Illustrations.

(*a*) If A. contracts to deliver goods to B. on a certain day at a certain price, and fails to do so, the natural damages are the difference between the contract price and the

market price at the time when B. has notice of the breach. (*Gainsford* v. *Carroll.*)

2 B. & C. 624.

In such a case, B. is entitled to supply himself in the market and charge A. with the cost, but he must not delay on a rising market, for he is bound to take all reasonable steps to mitigate the damages, and he is not entitled to make good A.'s contract in an unreasonable or oppressive manner, *e.g.*:—

(*b*) A., travelling for amusement, misses a train by default of the railway company. Though there was another train starting in an hour, he took a special train and claimed the expense. *Held*, that this was unreasonable. (*Leblanche* v. *L. & N. W. Ry. Co.*)

1 C. P. D. 313.

(*c*) A. intrusted the broken shaft of his mill to B., a carrier, for carriage to the manufacturers, B. promising to deliver it next day. B. negligently failed to deliver for several days, during which time the mill was idle. A. claimed as damages the loss of the profits which he would have made had B. carried out his contract. *Held*, that as B. did not know that this result would follow, he was not liable for the special damage. (*Hadley* v. *Baxendale.*)

9 Ex. 341.

(*d*) A., a carrier who had undertaken to carry certain goods to a public exhibition, was held to have sufficient notice of the purpose to make him responsible for the loss of probable profits of exhibiting the goods which he failed to deliver in time. (*Simpson* v. *L. & N. W. Ry. Co.*)

1 Q. B. D. 274.

(*e*) A., a passenger by train, owing to the railway not making a connection, loses some business appointments, has to walk to his destination, and catches cold. He cannot recover for his loss of business (*Hamlin* v. *G. N. Ry. Co.*), nor for his illness, but he can for his personal inconvenience. (*Hobbs* v. *L. & S. W. Ry. Co.*)

1 H. & N. 408.

L. R. 10 Q. B. 117.

(*f*) A., the plaintiff, contracted to supply shoes at 4*s.* a pair to the French army. They had to be delivered on a

certain day or they would not be accepted. The railway was given notice of the time requirements and the penalty for unpunctuality, but of nothing else. They were delivered too late, and were sold in the market at 2*s.* 9*d.* a pair. The plaintiff claimed the difference between 2*s.* 9*d.* and 4*s.* a pair. It appeared that the market price had not varied between the day on which the shoes ought to have been delivered and the day on which they were received. *Held*, that the defendants were not liable for the special damage. (*Horne* v. *Midland Ry. Co.*) L. R. 7 C. P. 583.

(*g*) The defendants agreed to sell to the plaintiff the hull of a floating boom derrick and deliver it at a certain time. They believed that the plaintiff wished it for a coal store, which was the natural use, but in fact the plaintiff wished to use it for transhipping coals from colliers into barges, but he gave no notice of this special purpose. The defendants were late in delivery. *Held*, that they were liable for the loss of such profits as would have been made by using the vessel *as a coal store*, but not for more. (*Cory* v. *Thames Ironworks Co.*) L. R. 3 Q. B. 181.

If one party repudiates a contract, such repudiation is of no effect unless accepted and treated as a breach by the other party. If so accepted by the other party there is what is called an anticipatory breach of contract, and the damages are calculated as on the date of the acceptance—as if the contract had then run out. But the other party is not obliged against his will to so accept the repudiation as to be bound by the measure of damages on the day of repudiation. So where A. contracts to deliver goods a month hence, and repudiates to-morrow, B. may decline to accept repudiation, and

may claim that A. deliver the goods at the time fixed in the contract. In such a case there is no breach till the expiration of the contract time, and that is the moment at which the damages are calculated. (*Tredegar Iron and Coal Co.* v. *Hawthorn.*)

18 Times L. R. 716, C. A.

'Liquidated Damages' and 'Penalty'.

'There is nothing illegal or unreasonable in the parties by their mutual agreement settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained, and in all cases saves the expense and difficulty of bringing witnesses to that point.' (Per cur. *Kemble* v. *Farren.*)

6 Bing. 148.

Such an assessed sum is called 'liquidated damages', and is recoverable in full on a breach occurring.

If, however, the contract fixes a sum of money to be paid on a breach, **with no intention of assessing damages,** but as a penalty to be held over the other party *in terrorem* to secure performance, this is called a 'penalty', the Courts ignore it, and the plaintiff can only **recover the damages actually sustained.**

'Whether the sum mentioned in the agreement is to be treated as a penalty or as liquidated and ascertained damages is a question of law to be decided by the judge on a consideration of the whole instrument.' (*Sainter* v. *Ferguson.*)

C. B. 727.

The judge must look to all the circumstances of each particular contract—to what the parties did, as well as to the language used—and must say from them what the intention of the parties was. (*Pye* v. *British Automobile Syndicate.*) 1906. 1 K. B. 425.

The expression used by the parties is not decisive, and if the parties have used the expression 'liquidated damages', that ought to be disregarded only in plain cases, where the plain intention of the parties, to be gathered from all circumstances, is that the sum is to be a penalty. (Per Bigham, J., in *Pye* v. *British Automobile Syndicate.*)

It is a question not of words, or of forms of speech, but of substance and of things. (Per Lord Davey in *Clydebank Engineering and Shipbuilding Co.* v. *Castaneda.*) 1905, A. C. at p. 15.

The fact that a deposit had been made of the sum in question, is a material circumstance to be taken into account as in favour of liquidated damages. (*Pye* v. *British Automobile Syndicate.*)

There are, however, certain presumptions, viz.:—

(*a*) A fixed sum to be paid on a breach of a contract which is of uncertain value is presumptively liquidated damages. The fact that the sum is excessive is not of itself a sufficient ground for treating it as penalty; for the parties may make their own estimate. (*Astley* v. *Weldon.*) 2 B. & P. 351.

(*b*) A fixed sum to be paid on the breach of any term in a contract which contains terms, all of un-

certain value, is presumptively liquidated damages. (*Reynolds* v. *Bridge.*)

6 E. & B. 540.

(*c*) A fixed sum to be paid on breach of a contract which is of certain value, the sum being in excess is presumptively a penalty. (*Kemble* v. *Farren.*)

(*d*) A fixed sum to be paid on the breach of any term in a contract which contains terms, some of certain and others of uncertain value, is presumptively a penalty, for it cannot have been fixed with any regard to the value or extent of the breach. (*Kemble* v. *Farren.*)

(*e*) Where a single slump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious, and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification. (Per Lord Watson in *Lord Elphinstone v. Monkland Iron and Coal Co.*)

11 Ap. Cas. 382.

Illustrations.

(*a*) A manager of a theatre made a contract with an actor containing stipulations on each side of varying importance, as to performances, theatre regulations, benefits, and the payment of salary of £3 6*s.* 8*d.* a night, with a provision that if either party should neglect to fulfil any part of the agreement he should pay the other £1000; which was thereby declared to be liquidated damages and not penalty. *Held*, that this was a penalty, because it extended to any breach, including the neglect to pay £3 6*s.* 8*d.* a night. The damages were found to be £750. (*Kemble* v. *Farren.*)

6 Bing. 141.

(*b*) The Spanish Government contracted in 1896, at the time of the Spanish-American war, with the appellants for the building of four torpedo-boats, delivery to be within periods varying between six and a half months to seven and three-quarter months from date of the contracts. The contracts provided that 'the penalty for later delivery shall be at the rate of £500 per week for each vessel.' The vessels were delivered many months late: the Spanish Government paid the price and sued for £500 per week. *Held*, that the sum of £500 was to be regarded as liquidated damages and not as penalty, and the Spanish Government could recover in full, as it would be impossible to estimate the damage in such a case; and that the payment in full of the price was no waiver of the claim considering the position of affairs. (*Clydebank Engineering and Shipbuilding Co.* v. *Castaneda.*) 1905, A. C. 6.

Specific Performance.

A decree of specific performance is an order of the Court that a defendant shall specifically perform what he promised. It is a remedy lying in the discretion of the Court. 'The Court gives specific performance instead of damages only when it can by that means do more perfect and complete justice.' (Per cur. *Wilson* v. *Northampton and B. Ry.*) This remedy was peculiar to the Court of Chancery till the Judicature Act gave all Divisions of the High Court the same jurisdiction. But by section 34 specific performance of contracts between vendors and purchasers of real estate, including 'contracts for leases', are assigned to the Chancery Division. L. R, 9 Ch. 284.

It is only possible here to indicate the general

principles on which specific performance will or will not be granted.

It will be granted when damages are not an adequate compensation, *e.g.* in a contract for the sale of land, or in exceptional cases for the sale of goods where the chattel has a special or peculiar value to the party entitled, *e.g.* a valuable work of art, family pictures or heirlooms, or the tobacco box of a club. (*Fells* v. *Read.*) The jurisdiction can be exercised in the case of specific goods under the Sale of Goods Act, 1893.

3 Ves. 70.

56 & 57 Vict. c. 71, § 52.

Specific performance will not be granted where the Court is unable to supervise effectually the performance, as in contracts for personal services, *e.g.* a contract to sing or act at a theatre (*Kemble* v. *Kean*), nor where the transaction is not above suspicion of unfairness. (*Webster* v. *Cecil.*) Nor, as a rule, will specific performance be granted at the suit of an infant because the remedy is not mutual till he comes of age. (*Flight* v. *Bolland.*)

6 Sim. 333.

30 Beav. 62.

4 Russ. 298.

The jurisdiction is **in personam,** and specific performance can be granted against a party within the jurisdiction, though the subject-matter of the contract is outside. (*Portarlington* v. *Soulby.*)

3 M. & K. 104.

Injunction.

As specific performance compels a person to do, so injunction compels him to forbear from doing.

'Where parties contract in express negative terms that a certain act shall not be done, specific performance takes the form of an injunction re-

straining the party from doing the act. And an affirmative contract may be of such a kind that the Court, though it cannot enforce affirmatively the performance of the contract, may restrain a breach by injunction. If there is a clear breach of contract in doing the act, the Court may grant an injunction without giving the option of paying damages and though the damages are nominal; but unless there is a right of action the Court will not enforce the contract indirectly by an injunction.' Leake, 792.

Illustrations.

Miss Wagner contracted to sing at Lumley's Theatre, and for a certain time to sing nowhere else. She then made a contract to sing elsewhere, and declined to sing for Lumley. The Court would not compel her to sing for Lumley, but enjoined her from singing elsewhere. (*Lumley* v. *Wagner.*) 1 D. M. & G. 604.

Where there is no express negative stipulation, it would seem that it is only in exceptional cases that the courts will enforce a positive stipulation indirectly by injunction. Thus an injunction has issued against a confidential clerk in possession of trade secrets accepting other employment during his term of service, for such conduct contemplates the betrayal of his employer. (*Robinson* v. *Heuer.*) 1898, 2 Ch. 451, C. A.

A *mandatory injunction* is in affirmative form, *e.g.* ordering a defendant to pull down buildings wrongfully erected.

CHAPTER XI

INTERPRETATION OF CONTRACT

The object of the law is to carry into effect the intentions of the parties, and the writing, words and conduct of the parties are all valuable evidence of what the intention was.

If A. and B. make a contract by word of mouth, when the words are satisfactorily proved, the question is not what the parties meant, but what the words mean, for persons are presumed to say what they mean, and to mean what they say. It may be proved that the words were used in some technical or unusual sense. When this is proved, this sense will be given in order to carry out the intention of the parties.

If a contract has been reduced to documentary form no evidence may be given of the contract except the document itself, or secondary evidence of its contents when such is admissible, nor may the contents of such document be contradicted, altered, added to, or varied by oral evidence.

But it is permissible to prove that a document which purports to be a valid written contract is not what it purports to be. Thus the document,

whether under seal or not, may be proved to be vitiated by fraud, mistake, illegality, or to be dependent on a suspensive condition not yet fulfilled, which in the case of a deed would show it to be an escrow.

Illustration.

A. and B. enter into a written agreement for the sale of an interest in a patent, and at the same time agree verbally that the agreement shall not come into force unless C. approves. C. does not approve. The party interested may show this, for the evidence is offered not to vary a written agreement but to show that there was no agreement at all. (*Pym* v. *Campbell.*) 6 E. & B. 370.

It is also permissible to give oral evidence of some separate oral agreement on a matter as to which the document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the Court infers that the document was not intended to be the whole agreement.

Illustrations.

A. desired to send cattle by train from Guildford to Islington. At Guildford Station he was told that the cattle would be taken to King's Cross, but he was induced to sign a consignment note directing the cattle to be taken to Nine Elms Station only. At this intermediate station they remained and were neglected. The company urged that the note was conclusive evidence of the contract. *Held*, that *the consignment note did not constitute the complete contract*, and that parol evidence was admissible as to the prior conversations. (*Malpas* v. *L. & S.W. Ry.Co.*) L. R. 1 C. P. 36.

The same principle applies when the parties are taken to have contracted with an understood reference to usages of trade or otherwise, such not being repugnant to or inconsistent with the express terms of the contract. *E.g.* the defendant by deed leased to the plaintiff his land for twenty-one years. The plaintiff in the last year of his term sowed his land with corn, relying on a local custom which entitled the outgoing tenant to his way-going crop, *i.e.* the corn standing at the expiration of the lease. *Held*, that evidence could be given of this custom, Lord Mansfield saying that the custom was reasonable and for the benefit of agriculture, and did not alter or contradict the agreement. (*Wigglesworth* v. *Dallison.*)

1 Doug. 200.

But if the matter is of a sort about which the document is **not silent,** the maxim **'expressum facit cessare tacitum'** applies. Only where 'the contract is silent the custom speaks.'

Illustration.

A. leased his land to B. The local custom made the outgoing tenant an allowance for 'foldage' from the incoming tenant. If the lease had been silent the custom would have spoken. But the lease particularly specified the payments to be made by the incoming to the outgoing tenant, and did not mention foldage. *Held*, that the express terms of the lease excluded the custom. (*Webb* v. *Plummer.*)

2 B. & Ald. 746.

So, also, it is not allowed to give oral evidence contradicting the terms of a written instrument.

Illustration.

Evidence of a contemporaneous oral agreement to renew a bill of exchange is inadmissible, because that would contradict a written instrument in its terms. (*New London Credit Syndicate* v. *Neale.*) 1898, 2 Q. B. 487, C. A.

But oral evidence may be given to explain signs or words used in the document, *e.g.* if they are illegible, foreign, technical, or local, or if though common words they appear from the context to have been used in a peculiar sense, or as has been said, not **simpliciter** but **secundum quid.** In such latter case it is proper to inquire what the subject-matter of the contract is, as in *Burges* v. *Wickham.* *Vide infra.*

Illustrations.

(*a*) A lease contains a covenant as to 10,000 rabbits. Oral evidence is admissible to show that by local usage 1000 rabbits means 1200. (*Smith* v. *Wilson.*) 3 B. & Ad. 728.

(*b*) A. sells to B. '1170 bales of gambier'. Oral evidence is admissible to show that a 'bale' of gambier is a package compressed and weighing 2 cwt. (*Gorrissen* v. *Perrin.*) 2 C. B. N. S. 681.

(*c*) In voyage policies of marine insurance a warranty of 'seaworthiness' is implied. The meaning of 'seaworthiness' varies with the nature and risks of the voyage the vessel is to make. It is material, therefore, to inquire as to the subject-matter. (*Burges* v. *Wickham.*) 3 B. & S. 669. In a demise of a house with a covenant to keep it in tenantable repair, it is legitimate to inquire whether it be an old one in St. Giles' or a new palace in Grosvenor Square for the purpose of ascertaining whether the tenant has complied with his covenant. (*S. C.* per Blackburn, J.)

Evidence may be given to explain a **latent** but not a **patent** ambiguity.

A latent ambiguity is one not apparent on the face of the instrument, though in reality there are two states of fact which answer equally well to the instrument.

Illustration.

A testator devised land to 'Stokeham Huthwaite, *second* son of John Huthwaite.' In fact, Stokeham Huthwaite was the *third* son. Evidence was admitted to show whether the testator had mistaken the name or the description. (*Doe* d. *Le Chevalier* v. *Huthwaite.*)

3 B. & Ald. 632.

A patent ambiguity is one apparent on the face of the instrument, there either being an omission or an obvious contradiction.

Illustrations.

(*a*) A. leaves a legacy to B., 'according to Mr. —— his will.' Evidence not admissible to show how the blank was intended to be filled. (*Baylis* v. *A.-G.*)

Atk. 239.

(*b*) A. drew a bill of exchange for 'two hundred pounds', but the figures at the top were '£245', and the stamp corresponded with the higher amount. Evidence not admissible to show that £245 was the sum intended. (*Sanderson* v. *Piper.*)

5 Bing. N. C. 425.

A note or memorandum of a contract is a memorandum of what **has** taken place. It is not the contract, and only binds the party who signs it. Evidence may be given showing that the memorandum is not a complete and correct note of the contract made.

Illustration.

The defendant sells the plaintiff a horse and verbally warrants him quiet in harness, and also gives the plaintiff a paper in these words : 'Bought of George Pink a horse for £7 2*s.* 6*d.*—G. Pink.' The plaintiff may prove the verbal warranty. (*Allen* v. *Pink.*) 4 M. & W. 140.

Time 'of the Essence of the Contract.'

The Common Law said that where a time was fixed for performance of a contract, it was 'of the essence', and that if this condition were not fulfilled, the other party might treat the contract as broken. Equity on application for specific performance in the sale of land, held, that time was not of the essence, but that the provision was designed merely to secure performance within a reasonable time.

The Judicature Act, § 25 (7), provides that stipulations in contracts as to time shall receive, in all courts, the same construction as they would have heretofore received in equity.

In contracts for sale of goods, 'unless a different intention appears from the terms of the contract, stipulations as *to time of payment* are not deemed to be of the essence of the contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.' (Sale of Goods Act, 1893, § 10.) 56 & 57 Vict. c. 71.

CHAPTER XII

ASSIGNMENT

Assignment of rights and liabilities may occur, by act or agreement of parties, by the assignment of estates or interests in land to which covenants running with the land are annexed, by marriage operating on the contracts of the wife, by bankruptcy, or by death.

By Act of Parties.

None but the parties to a contract can sue upon it. But under certain conditions, an alteration may take place in the parties, by way of substitution.

It is, of course, open to A. and B., the original parties, to agree with C. that C. shall take B.'s place. This three-cornered agreement is a tearing up of the old, and the making of a new contract. This is **not** assignment.

But if A. owes B. £10 under a contract, and B., **without obtaining A.'s consent,** can transfer his right of action to C., the contract or right of action is said to be 'assignable'.

Liabilities cannot be assigned.

If A. owes B. £10, A. cannot, by arrangement

with C, compel B. to look for payment to C. For B. is entitled to the credit and substance, such as it is, of A. (*Humble* v. *Hunter.*) 12 Q. B. 310.

It is true that if A. has undertaken work requiring no special skill, he may send another to do it, but if the work is inefficiently done it is A. that is liable and not the substitute, and in any case A. is the party who sends in the bill. This, therefore, is not assignment at all.

Assignment of Rights under, or arising from Breach of, a Contract.

Such rights are included in the term **choses in action.** There have been three stages in the history of this part of the law.

(i.) **The Common Law View.**

At Common Law *choses in action*, including rights under a contract, and rights of action for breach of contract, were not assignable by act of the parties, whether or no they contracted expressly for themselves 'and assigns'.

Exceptions occurred to this rule in the case of documents assignable or negotiable by the law merchant or statute, as bills of lading, bills of exchange, and promissory notes.

(ii.) **Equitable Assignment.**

The Courts of Equity had no objection to the assignment of choses in action.

Choses in action are either **legal** or **equitable.**

A legal chose in action was one actionable in the Common Law Court, *e.g.* a debt.

An equitable chose in action was one on which an application had to be made to the Court of Chancery, *e.g.* a share in a trust fund administered by the Court of Chancery.

There are now two kinds of assignment, legal and equitable.

The legal assignment is the creation of the Judicature Act, 1873, and till then such a thing was unknown.

Before the Judicature Act:—

(i.) If there was an equitable assignment of an *equitable* chose in action, equity permitted the assignee to sue in his own name.

(ii.) If there was an equitable assignment of a *legal* chose in action, the assignee was allowed to sue in the name of the assignor, the assignor being compelled by Equity to lend his name (on an indemnity being given him against costs), and being regarded as a trustee for the benefits for his assignee, or the assignee had to join his assignor as a party, in order primarily to bind him and prevent him afterwards suing his debtor in a Court of law for the same debt, and also to enable him to dispute the assignment if he thought fit.

Since the Judicature Act:—

There can be a legal assignment of a legal chose in action, and the assignee can sue in his own name. But if the assignment does not satisfy the requirements of the Judicature Act,

the result may only be an equitable assignment, and then the assignor must be a party. (See *Durham Bros.* v. *Robertson.*) For the rules of equitable assignment are the same as before the Act. *Infra*, p. 166.

Where, however, the assignment is equitable but the assignor has no longer any valuable interest left in him, the House of Lords has permitted the assignee to sue alone. Thus in *Tolhurst* v. *Associated Portland Cement Manufacturers* (vide infra), where the assignor was a Company in liquidation and had sold all its interest to the assignee, Lord Macnaghten said that the Company was not a necessary or proper party. So in *William Brandt's Sons & Co.*, v. *Dunlop Rubber Co.*, where the assignor was bankrupt, the House of Lords did not require his trustee in bankruptcy to be joined. 1903, A. C. at p. 421. 1905, A. C. 454.

Equitable assignments may be made in any form of words with or without writing, so long as the intention to assign is expressed. (*William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*) 1905, A. C. 454.

Equitable assignments are affected by the following rules:—

(i.) Notice must be given to the debtor, if he is to be bound by the assignment, and after notice he cannot release himself by paying the assignor. (*Brice* v. *Banister.*) 3 Q. B. D. 569.

(ii.) The assignee takes, subject to equities, that is to all defences which could have

been raised against his assignor before notice given.

(iii.) Consideration, it is said, must be given by the assignee, but this has been doubted. (*Harding* v. *Harding.*)

17 Q. B. D. 442.

(iii.) **Statutory Assignment.**

The Judicature Act, 1873, § 25 (6), provides that—

'any *absolute assignment by writing* under the hand of the assignor (not purporting to be by way of charge only) of any *debt or other legal chose in action*, of which *express notice in writing* shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and shall be deemed to have been effectual in law (*subject to all equities* which would have been entitled to priority over the right of the assignee, if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.'

It will be noticed that the statutory conditions of a valid assignment are not the same as those imposed by the Court of Chancery.

The statute does not require consideration to support such an assignment, but if the assignment is not complete, the Court will not enforce it unless there be a valid consideration. *It requires both the assignment and the notice to be in writing.* There is no limit of time mentioned

in the section for the notice, nor is it stated by whom notice is to be given, but the effect of not giving notice is to let in all equities which may arise prior thereto. (*Walker* v. *Bradford Old Bank.*) 12 Q. B. D. 511. *It only applies to the assignment of legal choses in action.* It requires the assignment to be 'absolute', and not 'purporting to be by way of charge'. The distinction may be explained thus: A. owes me £10,000. I get 'advances', *i.e.* borrow from time to time from B. B. requires security. I can assign to him the whole of my £10,000 absolutely, and that assignment remains unaffected by the state of the account between B. and myself. If I pay B. off, he must execute a proper reassignment of the £10,000 to me, with notice to A. Or I can give B. a 'charge' on the £10,000. In that case his charge goes up and down *pari passu* with the state of my indebtedness to him: and if I repay all the advances, the charge automatically runs off. The statutory assignment must be out and out, and if there be an express or implied provision, that on a certain event, as on a repayment of advances, there shall be a reassignment, this reassignment must be executed in the statutory manner with written notice to the debtor. The statute regards the protection of the original debtor and places him in the assured position of knowing whom he has to pay.

Thus, a mortgage of debts due to the mortgagor

in ordinary form, with a proviso for redemption and reassignment upon repayment to the mortgagor, is an absolute assignment.

Illustration.

A firm of builders delivered to plaintiffs a document as follows:—

'*Re* Building Contract, South Lambeth Road. In consideration of money advanced from time to time, we hereby charge the sum of £1080, which will become due to us from John Robertson on the completion of the above buildings, as security for the advances, and we hereby assign our interest in the above-mentioned sum *until the money with added interest be repaid to you.*'

The plaintiffs gave notice to Robertson and sued him. *Held*, not an absolute assignment, for on repayment of advances and interest the assignment comes automatically to an end. (*Durham Bros.* v. *Robertson.*) As the assignment was equitable, the plaintiffs lost, because they had not joined the builders who had the legal interest as creditors.

1898, 1 Q. B. 765, C. A.

It must be possible to find in the document an intention to assign some definite sum, so that the debtor may know how much he is justified in paying to the assignee. The assignment must not contemplate the possibility of the debt going up or down, and the liability varying.

Illustration.

By assignment in writing A., in consideration of an advance, assigned to the plaintiff 'So much and such part of my income, salary, and other emoluments from H. (the

defendant in whose employ he then was) as shall be necessary and requisite for payment to you of any further or other sums in which I may hereafter become indebted to you.'

In an action by the assignee, *Held*, that this not being an absolute assignment of any definite sum, but an assignment of an unascertained part of a debt, a mere security by way of charge, was not within § 25 of the Act. (*Jones* v. *Humphreys*.) It was an equitable assignment, but the assignor had not been made a party. 1902, 1 K. B. 10.

With regard to other legal choses in action, in contracts involving personal confidence or ability, there can be no assignment, nor whenever by reason of change of business or change of parties the result of an assignment would be to impose on one of the contracting parties a greater liability than he ever intended to assume. But a contract that certain work shall be done or goods supplied *without regard to the persons engaged* is assignable.

Illustration.

T. contracted with the Imperial Company to supply them for fifty years, or for such shorter period (not being less than thirty-five years) as he shall be possessed of chalk available and suitable for the manufacture of Portland cement, . . . and the Company bound itself to take at least 750 tons of chalk per week, and so much more as they might require for the whole of their cement manufacture on its land near the quarries. The Imperial Company went into voluntary liquidation, and sold all its business and land, and assigned this contract to the defendant Company, a larger company with larger capital.

T. stood by while the Imperial Company was in process of dissolution.

On these facts it was held by Mathew, J., in the court of first instance, that as the assignment tended to impose on the plaintiff a greater liability than he had contracted to bear, it did not bind him. The Court of Appeal reversed this decision. The House of Lords (the Lord Chancellor doubting, and Lord Robertson dissenting) held that the true view was that the contract was for the mutual benefit and accommodation of the quarry and the works, which were adjacent, that there was no question of personal confidence or personal skill, that the assignment could not and did not increase the liability, and that the intention of the parties was that the contract should be assignable by either party. (*Tolhurst* v. *Associated Portland Cement Manufacturers.*)

1903, A. C. 414.

Covenants running with the Land.

As regards Leaseholds.

Covenants run both with the land and with the reversion; with the land by Common Law, with the reversion by statute; that is, if A. gives a lease of land to B. with covenants in it, 'touching and concerning the thing demised', those covenants will bind any person to whom B. assigns his lease, and any person to whom A. sells his reversion.

32 H. VIII. c. 34.

Among such covenants are covenants to repair, or not to carry on a trade on the demised premises (*Bramwell* v. *Lacy*); or in the case of a lease of a public-house a covenant to buy beer only from the lessor. (*Clegg* v. *Hands.*)

10 Ch. D. 691.

44 Ch. D. 503.

Illustration.

A covenant by a lessee not to assign his lease without the lessor's consent runs with the land, and applies to a reassignment to the original lessee. (*McEacharn* v. *Colton.*) 1902, A. C. 104 (P. C.).

Personal or collateral contracts between landlord and tenant, which do not concern the thing demised, do not pass.

As regards Freeholds.

At the Common Law the benefit of covenants made upon a purchase runs with the land, but not the burden. Thus if A. sells land to B., the covenants, *i.e.* the promises under seal of A., unless they are purely personal, enure for the benefit of B.'s assigns, but the covenants of B. restricting the enjoyment of his land do not bind B.'s assigns, unless they create interests, recognised by the law, such as easements. Parties are not permitted to invent new modes of holding and enjoying real property and to impress on their lands a peculiar character which shall follow them into all hands, however remote. (*Keppel* v. *Bailey.*) 2 M. & K. 517.

The Courts of Equity have, however, established a modification of the common law rule. According to equitable principles, a purchaser of land **with notice of a restrictive covenant,** *i.e.* one restricting for the benefit of others his use of the land, *e.g.* that the land shall not be built over, is bound by the covenant. (*Tulk* v. *Moxhay.*) The reason 2 Phill. 774.

given in that case was that it would be a fraud on those entitled to the benefit of the covenant, for the vendor to sell the land discharged of the restriction.

The view now taken of restrictive covenants created by an owner of land with an adjoining owner is that they are in the nature of negative easements, and bind the land in equity. They are paramount to the owner's title, and a purchaser can only buy what his vendor has, subject to this, that the rights may be defeated by a purchaser for value without notice. (*In re Nisbet & Potts' Contract.*) This case followed the judgment of Sir George Jessel, M.R., in *L. & S. W. Ry. Co.* v. *Gomm.*

1906, 1 Ch. 386. C. A.

20 Ch. D. 562.

'Constructive notice' is sufficient to fix the purchaser with liability. A purchaser is bound to inquire into the title of his vendor, and will be affected with notice of what appears upon the title if he does not so inquire.

A restrictive covenant is a valid objection to the title, and entitles the purchaser who has contracted without notice to repudiate the purchase. (*In re Cox and Neve's Contract.*)

1891, 2 Ch. 109.

Illustration.

One Kidd covenanted not to build shops on a certain piece of land of which he had the fee simple, in 1867. Some time before 1877 one Headde squatted on the land. He was a trespasser, but was undisturbed and acquired a statutory title by adverse possession, and in 1890 sold

the land to Nisbet. In 1903 Nisbet agreed to sell the land to Potts. Potts before completion discovered the existence of the covenant and refused to complete. It was held that he was right, that the covenant was still alive, that Headde was not a purchaser for value without notice, and so was bound, and that Nisbet had constructive notice. (*In re Nisbet & Potts' Contract.*)

This equitable modification only applies to **restrictive** covenants; the purchaser is not affected by notice of **affirmative** covenants, *i.e.* such as could not be complied with, without expenditure of money, or which could only be enforced by specific performance or damages against the covenantor.

For *the operation of marriage* on contracts, see *ante.*

By Bankruptcy.

An adjudication of bankruptcy operates as an assignment in law of all the debtor's property to a trustee for the benefit of his creditors, including rights of action for money payable, and for damages for breach of contract, and the right of enforcing unexecuted contracts by which benefit may accrue to the estate, excluding, however, that kind of contract where the personal skill or conduct of the bankrupt would form a material part of the consideration.

In the case, however, of goods sold, the unpaid seller may refuse to deliver unless the price is paid, and if he has parted with the possession to a carrier on behalf of the buyer, may stop *in transitu.*

The trustee may, by giving written notice within twelve months, disclaim any unprofitable contracts. (Bankruptcy Act, 1890, § 13.)

By Death.

Leaving aside covenants attached to freeholds or leaseholds, which are mentioned elsewhere, the outstanding rights and liabilities of the deceased, speaking generally, enure to the executor or administrator, *e.g.* on bills and notes to which the deceased was a party when he died. A banker's cheque is, however, an order to pay, which is revoked by the death of the maker, and the executor cannot be sued on it unless it was presented and dishonoured in the maker's lifetime. A continuing guarantee is not determined by the surety's death. Such contracts as involve the personal skill and competence of the deceased, or which involve personal relations, such as promises of marriage, partnership, agency, service or apprenticeship, are as a rule determined by death.

Negotiability

Negotiability differs from assignability in some important respects. Assignability only puts the assignee into the shoes of the assignor; he takes the benefit of his assignor's rights and no more. The common law says: *Nemo dat quod non habet.*

Negotiability, which is the child of the law mer-

chant, is the property by which certain undertakings to pay pass from hand to hand like cash.

Where an instrument is, by the custom of trade or by statute, transferable like cash by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a 'negotiable instrument', and the property in it passes to a *bonâ fide* transferee for value. (*Crouch* v. *Crédit Foncier*, per Blackburn, J.) L. R. 8 Q. B. at p. 381.

Such a *bonâ fide* transferee, *i.e.* one that takes honestly, without knowledge of any defect or want of title, has a perfect title notwithstanding any defect of title in the person from whom he took it. He takes, in other words, 'free from equities'.

Illustration.

Highwaymen stopped a mail coach and robbed it. Among the spoils was a bank note. The owner stopped the note at the bank. In a few days the plaintiff, who had taken the note innocently in the course of business, presented it for payment at the bank. The defendant, one of the cashiers, recognised it, and refused either to cash it or hand it back. In an action brought by the plaintiff for the recovery of the note, Lord Mansfield held that bank notes are like cash and, as with cash, the true owner cannot recover them after they have passed in currency. 'So in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bonâ fide* consideration, but before money has passed in currency, an action may be brought for the money itself.' Judgment accordingly for the plaintiff. (*Miller* v. *Race.*) 1 Burr. 452.

A shopkeeper who innocently takes a stolen bank note, in payment of his account, is a *bonâ fide* holder for value, and can retain it against him from whom it was stolen, and consequently can demand payment of it by the bank.

As the instrument passes from hand to hand, like cash on delivery, no notice need be given to the party chargeable.

It is not necessary for the *bonâ fide* holder for value to have given value himself. It is enough if value has been given somewhere in the currency of the instrument. Value is presumed to have been given, though this presumption may be rebutted by evidence to the contrary, and though an illegal origin may throw on the holder the onus of proving that value has in fact been given.

The following instruments are judicially recognised as negotiable in this country: Bills of exchange, promissory notes (3 & 4 Anne, c. 9), cheques and circular notes, all being properly indorsed, if requiring indorsement, and not overdue or restrictively indorsed; exchequer bills in blank, India bonds, bonds (51 Geo. III. c. 4), and scrip of foreign and colonial Governments expressed as payable to bearer.

An I.O.U. is merely a written acknowledgment of a debt, and is not negotiable.

The quality of negotiability can be conferred by statute, or by the custom of merchants. The Exchequer Chamber in *Goodwin* v. *Robarts* dis-

L. R. 10 Ex. 337.

sented from the view till then entertained that the law merchant was fixed and stereotyped, and in the *Bechuanaland Exploration Co.* v. *London Trading Bank*, Kennedy, J., attributing more weight to the 'generality' of the custom than to its antiquity, allowed the negotiability of certain English company debentures which were payable to bearer, but, owing to conditions being indorsed thereon, were not promissory notes. 1898, 2 Q. B. 658.

This judgment has been approved and followed by another eminent commercial lawyer, Bigham, J., in *Edelstein* v. *Schuler & Co.* The learned judge pointed out that in these days 'usage is established much more quickly than in days gone by; more depends on the number of the transactions which help to create it than on the time over which the transactions are spread.' 1902, 2 K. B. 144.

CHAPTER XIII

AGENCY

The topic of agency has two aspects, dealing respectively with—

(1) The relation between principal and agent.

(2) The relation between a third party and the agent or his principal.

1. *The relation between principal and agent. The source of the authority.*

As a general rule what a man can lawfully do himself, he can lawfully do through an agent.

If the agent's business is to make a contract under seal, the authority must be given by an instrument under seal called a 'power of attorney'.

To make contracts not under seal no particular form of appointment is required.

'No one can become the agent of another except by the will of the principal manifested in writing, or orally, or by his being placed in a situation in which, according to the ordinary usages of mankind, he would be understood to represent and act for the principal.' (*Pole* v. *Leask*.)

35 L. J. Ch. 155.

If the authority is expressly conferred by writing or words, it is **'express agency'**; if it is

to be inferred from **the conduct of the principal, it is 'implied agency'.**

The extent of the authority is settled either by the express terms conferring it or by the circumstances or conduct from which it is implied.

If an express authority be given in writing or words, when the limits set by the writing or words are determined, the principal is bound within those limits and not outside; they mark the scope of the authority.

But when the authority is to be inferred from the conduct of the principal, conduct, that is, which would induce any reasonable man to believe that A. was really P.'s agent, *e.g.* if P. allows his servant, mistress, or wife, to do the shopping at T.'s shop and afterwards pays the bills without demur, the agency is taken to continue as regards dealing with T. till notice is given to the contrary. 'If a man send his servant with ready money to buy meat or other goods, and the servant buys upon credit, the master is not chargeable. But if a servant usually buy for the master upon tick and the servant buy some things without the master's order, yet if the master were trusted by the trader the master is chargeable.' (Per Holt, C.J.) The agent can thus exceed his real authority and yet bind his principal. 1 Show. 95.

Agency arising thus is sometimes called **'agency by estoppel'**, for where the principal so acts as to hold out that the agent had such authority and

induces a party to deal with him on the faith that it is so, he is estopped from denying this authority as against the party who believed what was held out and acted on it. (See *Pickering* v. *Busk.*) So where a person sends goods to an auction room, or to a factor or broker, **whose business it is to sell such goods,** he is presumed to authorise a sale. (*S.C.*)[1] It would be otherwise if the goods were sent to a warehouseman **whose business is the custody of goods.** (*Cole* v. *North-Western Bank.*) But there must be a representation by words or conduct to raise this estoppel. Mere negligence, which has no reference to any duty which the law imposes, works no estoppel. A person who does not lock up his goods, which are consequently stolen, may be negligent as regards himself, but as he is under no duty to lock them up he is not estopped from claiming his goods from those who have honestly purchased them from the thief. (See *Farquharson Bros.* v. *King & Co.*)

15 East, 38.

L. R. 10. C. P. 354.

1902, A. C. 325.

If a servant steals his master's goods, the person

[1] Under the Factors Act, 1889, when a mercantile agent, as defined in the Act, is, with the consent of the owner (such consent being presumed in the absence of evidence to the contrary), in possession of goods or the documents of title to goods, any sale, pledge, or other disposition of the goods made by him in the ordinary course of business of a mercantile agent shall be as valid as though he were expressly authorised by the owner, provided that the person taking acts in good faith and without notice of the want of authority.

who has innocently bought them has no title against the master.

Illustration.

The plaintiffs, timber merchants, warehoused with a dock company timber, instructing the company to accept delivery orders and transfers signed by their clerk. The clerk had authority to make small sales to known customers. The clerk fraudulently gave the company orders for the transfer of the timber to himself under an assumed name, and then in that name sold the timber to the defendants, who paid the clerk in good faith. The defendants knew nothing of the plaintiffs or of the clerk under his real name. *Held*, that as the plaintiffs had not held out the clerk as their agent to sell to the defendants, they were not estopped for denying his authority, and that as the clerk had no title or apparent authority, he could give no title. Judgment for the plaintiffs for the value of the timber. (*Farquharson Bros.* v. *King & Co.*) 1902, A. C. 325.

A species of implied agency is called '**agency by necessity**'. This arises only in exceptional cases, where an authority is implied to do what is necessary under the circumstances. Thus the master of a ship can in case of necessity pledge the owner's credit for repairs and to raise funds for the successful prosecution of the voyage, and even sell ship or cargo. The position must be such that he cannot communicate with or receive instructions from his owners in reasonable time. This sort of necessity has been much limited by the ubiquity of telegraphic cables. So also a land carrier may become an agent by necessity to pledge

the owner's credit for the safety of the goods. (*G. N. Ry.* v. *Swaffield.*)

L. R. 9 Ex. 132.

So upon the necessity of the case any person may accept or pay a bill of exchange, *supra* protest, for the honour of the drawer and come upon him for payment, though no authority be given. (Bills of Exchange Act, 1832, §§ 65–68.)

So, too, a wife deserted by her husband becomes his agent by necessity to supply her wants upon his credit. (*Eastland* v. *Burchell.*)

3 Q. B. D. at p. 436.

A distinction is sometimes drawn between a general and special agent. The former is a person employed in a position of a generally recognised character, and is taken, apart from his instructions, to have authority to do all those things which a person in his position usually does. He may thus deviate from his instructions and yet bind his principal.

A particular or special agent is one entrusted with a particular commission; he has no apparent authority beyond the limits of his appointment, and the principal is not bound by his acts in excess of those limits. (*Fenn* v. *Harrison.*)

3 T. R. 757.

Illustrations.

(*a*) The servant of a horse dealer entrusted with the sale of a horse has implied authority to bind his principal by a warranty, even though (unknown to the buyer) he has express orders not to warrant. In such a case there is an ostensible authority to do that which is usual in the

conduct of the business of a horse dealer. (*Howard* v. *Sheward.*) L. R. 2 C. P. 148.

(*b*) The servant of a private gentleman entrusted on one occasion to sell a horse, without authority warrants soundness, the master is not bound by the warranty, and if he repudiates it the sale is void. (*Brady* v. *Todd.*) 9 C. B. N. S. 592.

(*c*) A., the manager of a tied house for principals whose existence was unknown, was forbidden to purchase certain articles except from his principals, the defendants. In defiance of this instruction he bought from the plaintiff, who gave credit to the manager, and, subsequently discovering the principals, sued them. *Held*, that the defendants, being the real principals, were liable for all the acts of an agent which were within the authority of agents of that particular character, although he had never been held out as agent by them, and though he had exceeded his authority. (*Watteau* v. *Fenwick.*) 1893, 1 Q. B. 346.

(*d*) P. entrusts A. with securities to raise £2000. A. on these securities borrows £3000 from T. and appropriates the difference. T. acts *bonâ fide* in ignorance of the limitation, but not knowing of the existence of the authority and making no inquiry. *Held*, P. cannot redeem the securities without paying £3000. (*Brocklesby* v. *Temperance Building Society.*) 1895, A. C. 173.

Ratification.

Omnis ratihabitio retrotrahitur et mandato aequiparatur. A person may be bound by approving and taking on himself a contract made by another person under certain conditions, viz. the latter must profess to act as agent (*Keighley, Maxsted & Co.* v. *Durant*) for a person contemplated by him (*Wilson* v. *Tumman*, and *Watson* v. *Swann*) and in existence at the time (*Kelner* v. 1901, A. C. 240. 6 M. & G. 236. 11 C. B. N. S. 756.

L. R. 2 C. P. 174. L. R. 7 H. L. 653. *Baxter*) for such a thing as the principal can lawfully do. (*Ashbury Carriage Co.* v. *Riche.*) Then though the principal has given no authority he may **ratify** and make the act his own.

Illustration.

The defendant made an offer of sale of certain premises to A., who was the agent of the plaintiffs, but had no authority to buy. A. accepted for the plaintiffs on December 13. The defendant attempted to withdraw his offer on January 13 next year. On January 28 the plaintiffs ratified. *Held*, that the withdrawal was inoperative, as the ratification related back to December 13. (*Bolton Partners* v. *Lambert.*)

41 Ch. D. 295.

The subsequent ratification is sufficient to satisfy the Statute of Frauds, which requires signature by the party or 'his agent thereunto lawfully authorised'.

As between principal and agent:—

The principal is impliedly bound to indemnify his agent against all expenses and liabilities incurred in the proper discharge of the agency.

Any surreptitious dealing between the agent and the third party is a fraud on the principal, and entitles him to repudiate the contract, *e.g.* the bribery of the agent by the third party. (*Shipway* v. *Broadwood.*)

1899, 1 Q. B. 369.

The agent must not make a profit for himself out of the transaction, so a gratuity given to an agent for the purpose of influencing his conduct of

the agency vitiates a contract subsequently made, and if given after the execution of the agency, must be given up to the principal, as money received for his use. This rule does not apply to allowances which are customary in the business, and are known to the principal. Secret commissions on sales are recoverable by the principal, or he may avoid the sale as fraudulent, or he may sue the agent and the third party jointly or severally for damages for the fraud. An agent must not himself be the buyer from or the seller to his principal without the principal's consent; otherwise the principal may repudiate. (*Robinson* v. *Mollett.*) L. R. 7 H. L. 802.

Revocation.

The principal can as a rule, as against the agent, revoke the authority at any time before execution. He cannot, however, revoke 'an authority coupled with an interest', *i.e.* if the agent is employed to do certain acts which ordinarily will put him under an obligation to pay money for his principal, and the agent before revocation acts and incurs the obligation, the authority cannot be revoked.

Illustration.

A. employed B., a betting agent, to make bets for him; this implied an authority and obligation to pay lost bets; after the bets had been lost and B. had incurred the obligation, A. could not revoke his authority. On his attempt to do so: *Held*, that B. might disregard it, pay the bets and recover from A. (*Read* v. *Anderson.*) 13 Q. B. D. 779.

This case, though a good illustration of what is meant by an authority coupled with an interest, has been destroyed for other purposes by the
55 Vict. c. 9. Gaming Act, 1892.

If a principal has represented that a person is his agent, as may happen by an habitual course of dealing through such agent, the agency cannot be effectively revoked as against persons **with whom he has so dealt** without giving them express notice.
11 A. & E. 589. (*Trueman* v. *Loder*.)

The death, insanity, or bankruptcy of a principal as a rule puts an end to an agent's authority, for if the principal can no longer act for himself, his agent cannot act for him. (Per Brett, L.J., in
4 Q. B. D. at p. 666. *Drew* v. *Nunn*.)

But contracts made by the agent after the determination of the authority are not void. For the agent, whether he knew or not, is liable to an action for damages at the suit of the third party. For if he represent himself as an agent for another, and knowing that he has no authority, contract in that capacity with a third party, or by that representation induce the third party to enter into any business transaction, he is liable in an action by the third party for damages in **Tort**
3 B. & Ad. 114. (*Polhill* v. *Walter*); and if he honestly but mistakenly believed that he had the authority, he is liable to an action by the third party for damages,
8 E. & B. 647. on an '**implied warranty of authority**'. (*Collen* v.
1903, A. C. 114. *Wright*, affirmed in *Starkey* v. *Bank of England*);

and this is so, whether (1) he never had authority or (2) the authority that he once had has ceased by reason of facts, of which he had neither knowledge nor the means of knowledge. (*Yonge* v. *Toynbee.*) 1910, 1 K. B. 215, C. A.

But where the principal has himself represented that the agent possesses his authority, the third party is entitled to act on those representations till he has notice of the revocation, and the principal is bound. And insanity forms no exception to the general law as to principal and agent. 'Insanity is not a privilege, it is a misfortune and must not be allowed to injure innocent persons.' (Per Bramwell, L.J., in *Drew* v. *Nunn.*) 'Suppose that a person makes a representation which after his death is acted upon by another in ignorance that the death has happened: in my view the estate of the deceased will be bound to make good any loss which may have occurred through acting upon that representation. It is, however, unnecessary to decide this to-day.' (Per Brett, L.J., in *Drew* v. *Nunn.*)

It would thus seem that the third party may have alternative rights of action.

The relations between the third party and the agent and his principal.

There are three classes of case.

i. Where the agent merely acts as go-between and having connected the parties, drops out, and leaves his principal and the third party face to face.

ii. Where the agent is liable and not the principal.

iii. Where either can be sued at the option of the third party.

i. **Where the principal is liable and not the agent.**

In the construction of contracts made by a person as agent for a disclosed principal the presumption is that the principal and not the agent is the contracting party. This is, however, to be read in connection with the general rule that where a person signs a contract in his own name without qualification, he is *primâ facie* to be deemed to be contracting personally, and in order to prevent his liability attaching it must be apparent from the other portions of the document that he did not intend to bind himself as principal.

Illustrations.

(*a*) A charter-party was signed 'for E. F., of Anamaboe, C. D., Brothers, *as agents*.' *Held*, that as there was nothing in the body of the contract to control these words it was conclusive that C. D. did not sign as principal. (*Deslandes* v. *Gregory*.)

2 E. & E. 602.

(*b*) So also a contract, 'We have this day sold you *on account of* J. M. & Co., Valencia, 2000 cases Valencia oranges, &c.—J. C. Houghton & Co.' *Held*, defendants not liable. (*Gadd* v. *Houghton*.)

1 Ex. Div. 357.

In such a case, however, the broker may be made liable **in addition** to his principal by the

usage of the **trade,** but evidence of usage that he should be liable **instead** of the principal would contradict the contract and be inadmissible. (*Pike* v. *Ongley.*) 18 Q. B. D. 708.

ii. **Where the agent is liable and not the principal.**

There are certain established cases.

(*a*) If a seller of goods knows that he is dealing with an agent and knows who his principal is, and chooses to give exclusive credit to the agent, he cannot afterwards sue the principal. (*Paterson* v. *Gandasequi,* and *Addison* v. *Gandasequi.*) But the seller must make an election. 16 East, 62. 4 Taunt 573.

Illustration.

C., a broker, was employed by the defendant to buy cotton for him, with instructions not to disclose his name. C.'s credit was not good enough to get the cotton on his own responsibility, and at the plaintiff's request he gave him the name of his principal. In the notes C. was named as the buyer. C. sent defendant an advice that he had bought for him, and defendant did not repudiate. C. was called on to pay, but as he was unable, the plaintiff sued the defendant. *Held,* that the insertion of C.'s name in the notes and the subsequent demands for payment did not amount to an election to give credit to C. alone. The plaintiff had expressly asked for the principal's name. (*Calder* v. *Dobell.*) L. R. 6 C. P. 486, Ex. Ch.

(*b*) Where the agent contracts by deed in his own name, the technical rule operates that those

persons only can sue or be sued on an indenture who are described in it as parties thereto. (*Southampton* v. *Brown*, and *In re Pickering*.)

6 B. & C. 718.
L. R. 6 Ch. 525.

(*c*) By the law merchant no person can be sued unless he appears as a party by name or designation on the face of a bill of exchange or promissory note; there is no undisclosed principal; so an agent who signs or accepts a bill or note in his own name, though he describe himself as agent, is personally liable on them to the holder (*Leadbitter* v. *Farrow*), unless he expressly on the face of the bill or note excludes all personal liability. (Bills of Exchange Act, 1882, § 26.)

5 M. & S. 345.
45 & 46 Vict. c. 61.

(*d*) If a man state himself to be an agent for a principal, when there is no person in existence at the time the contract is made who might be such principal, he is in law himself the principal, as when defendants were held liable on a contract signed by them 'on behalf of' a company not then formed. (*Kelner* v. *Baxter*.)

L. R. 2 C. P. 174.

One point remains. There is no rule of law that an agent here is personally liable on contracts he makes for a foreign principal (*Green* v. *Kopke*), but by long usage it is a presumption of fact that the foreign principal has not authorised his credit to be pledged, and that the third party does not give credit to the foreigner, in the absence of express evidence to the contrary. (Per Blackburn, J., in *Elbinger Gesellschaft* v. *Clayc*; and see *Maspons* v. *Mildred*.)

18 C. R. 549.
L. R. 8 Q. B. 317.
9 Q. B. D. at p. 541.

iii. **Where either principal or agent can be sued at the option of the third party.**

When A. is known to be acting as agent, but the identity of the principal is unknown, the seller can, as a rule, proceed against A. because he could not be expected to give credit to some one whose name was unknown to him, or he can proceed against the principal, because as the name had not been told him, he had no opportunity of debiting him originally. (*Thomson* v. *Davenport.*) 9 B. & C. 78.

Cases, however, vary in their circumstances, and it is a question what was the intention of the parties; this is arrived at partly *primâ facie* by seeing how and in what character the agent makes the contract, and by evidence of usage. (See *Hutchinson* v. *Tatham.*) L. R. 8 C. P. 482.

When A. is not known to be an agent, but is the ostensible principal, the third party can sue either A. or his principal after discovering him. (*Smethurst* v. *Mitchell.*) 1 E. & E. 622.

This is a strictly alternative liability. It is a right of choice. The third party cannot, after pursuing one to judgment, turn against the other; but no legal proceedings short of judgment will bar him. (*Curtis* v. *Williamson*, discussing *Priestley* v. *Fernie.*) L. R. 10. Q. B. 57. 3 H. & C. 977.

Alteration of the account between principal and agent.

If T., the third party, sells to A., and knows that A. is acting for a principal (name undisclosed), the fact that P., the principal, has paid A. will not

preclude T. suing P. for the price unless before such payment T. has by his conduct misled P. into believing that T. had already been paid by A. (*Irvine* v. *Watson.*)

5 Q. B. D. 414.

The same rule applies when T. is ignorant of the **existence** of a principal, *e.g.* where the plaintiff sold goods to A., an agent of the defendant, in his own name, treating him as the principal, and supposing him to be the buyer, and the defendant a reasonable time afterwards *bonâ fide* paid A. *Held*, that defendant was nevertheless liable to the plaintiff. (*Heald* v. *Kenworthy.*)

10 Ex. 739.

But when the seller deals with the agent as sole principal, and the nature of the agent's business is such that the principal **ought to believe** that the seller has so dealt, it would be unjust to allow the seller to proceed against the principal, after the principal has paid the agent. (Per Brett, L.J., in *Irvine* v. *Watson.*)

The case of *Armstrong* v. *Stokes*, in which it was held that a seller who had given credit to an agent, believing him to be the principal, could not recover against the undisclosed principal if the principal had *bonâ fide* paid the agent at a time when the seller still gave credit to the agent and knew of no one else as principal, was explained in *Irvine* v. *Watson* to be based on the peculiar position of the Manchester commission agents, and the Court of Appeal intimated that even so it might be reconsidered.

In *Davidson* v. *Donaldson* it was held that to discharge P. from liability on a debt contracted by A., P. must show that T. misled him into believing that T. had elected to give exclusive credit to A., and that P. had been prejudiced by that belief. It is not enough that T. should have delayed enforcing payment from A. 9 Q. B. D. 623.

Set-off against the principal.

The rule is stated in *Elbinger Gesellschaft* v. *Claye*, that the right to sue and the liability to be sued are correlative. If P. can be sued he can also sue. L. R. 8 Q. B. 317.

If T. has bought from A., who sells in his own name for an undisclosed principal, and the principal sues T. for the price, T. cannot set-off a debt due to himself from A. unless in making the contract he was induced by the conduct of the principal to believe that A. was selling on his own account. (*Cooke* v. *Eshelby*.) 12 Ap. Cas. 271.

It is not enough that A. should be selling in his own name, for that does not necessarily mean that he **was selling his own goods.**

In this behalf there is a distinction between a 'factor' and a 'broker', for the 'broker' is not entrusted with possession of the goods, while the 'factor' is, and moreover often has a lien on them for advances.

A person buying from a 'factor' who is clothed with the apparent ownership may therefore set-off (*George* v. *Clagett*) where he might not against a broker. (See *Montagu* v. *Forwood*.) 7 T. R. 359. 1893, 2 Q. B. 350, C. A.

If T. knows A. to be an agent, he has no right of set-off.

Species of Agents.

The following sorts of agents call for notice:—

The Factor is an agent entrusted with the possession of goods for the purpose of sale. (Per Cotton, L.J., in *Stevens* v. *Biller.*) He has authority to sell them in his own name, and sells them on a commission. He has authority to sell on the usual terms of credit, and as a rule to receive payment so as to bind his principal.

25 Ch. D. 31, C. A.

If he guarantees payment of the account to his principal he gets an additional commission termed a '*del credere* commission', and in virtue of this commission he may be called a '*del credere* agent'.

He has a lien on the goods and their price when sold, for advances and for the balance of account arising out of the employment.

The Common Law gives the factor no authority to *pledge* goods, this not being incidental to an authority to sell. But the Factors Act, 1889, after defining a 'mercantile agent' as one having in the customary course of his business as such agent authority to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of goods, goes on to enact that where such mercantile agent is with the consent of the owner in possession of goods or of the

52 & 53 Vict. c. 45.

documents of title to goods, any sale, pledge, or other disposition of the goods made by him in the ordinary course of his business as mercantile agent shall be as valid as though expressly authorised by the owner, provided the party taking under the disposition acts in good faith and without notice of the want of authority. The consent of the owner shall be presumed in the absence of evidence to the contrary, and the determination of such consent is immaterial if the party taking under such disposition has no notice of the determination.

The Broker is an agent employed to make bargains and contracts in matters of trade, commerce, and navigation between other parties: he makes the bargain and receives a commission, usually termed a 'brokerage'. He may be employed by one party to buy or to sell, or he may be authorised by both to negotiate between the two, but he may not represent both unless they are aware of this fact. The broker as a rule has no possession of the goods which he sells, and so has no lien on them. The insurance broker being intrusted with the policy has a lien on it for his account. Apart from usage he cannot receive payment so as to bind his principal. The employment of a broker in a particular trade or market authorises him to contract according to the usages of the trade or place so far as they are not inconsistent with his employment as broker.

He is primarily the agent for the party who first employs him, but when the contract is made, he becomes agent for the other party as well. When the contract is made he enters it in his book and signs it; he then sends a copy to each of his principals; the one sent to the buyer is called the 'bought note', the one sent to the seller is called the 'sold note'.

The entry in the broker's book is the original contract, and is a sufficient memorandum to satisfy the Sale of Goods Act; in the absence of a signed entry in the book either of the notes if uncontradicted by the other, and if otherwise sufficient, satisfies the statute. (*Goom Aflalo* and *Sievewright* v. *Archibald*, and see 'Blackburn on Sale', p. 80 *sq.*)

6 B. & C. 617.
17 Q. B. 115.

The Commission Agent is one employed to buy or sell goods in England as principal for a correspondent abroad, or to buy or sell goods in a foreign market as principal for a correspondent in England, on the best terms, charging his correspondent with the price of the goods and a commission for his service.

He establishes no privity of contract between his employer and the third party. (See per Blackburn, J., in *Ireland* v. *Livingstone*.)[1]

L. R. 5 H. L. at p. 406.

[1] Though the above is the strict meaning of the title 'commission agent', the term is now quite loosely used to denote any person who, outside well-defined employments—such as stockbroking, shipbroking, insurance, &c.—is ready

The Auctioneer is an agent to sell goods at a public auction on commission. He is in the first place agent for the seller, but when the hammer falls he becomes the agent for the buyer as well, for the purpose of making a sufficient signature to bind both under the Sale of Goods Act. He has actual possession and a lien for his charges, and he may sue the buyer in his own name and may contract in such terms as to bind himself personally. (*Woolfe* v. *Horne.*) 2 Q. B. D. 355.

He has authority to accept payment and to give a receipt to bind his principal, but probably not to sell on credit apart from usage.

If an auctioneer advertises a sale for a certain day and then does not sell, he is not liable in damages, such an advertisement being a mere statement of intention. (*Harris* v. *Nickerson.*) L. R. 8 Q. B. 286.

But if he advertises a sale 'without reserve', and holds the sale, he is liable on a contract with the highest *bonâ fide* bidder for any lot, that the lot shall be knocked down to him. (*Warlow* v. *Harrison.*) 9 E. & E. 25.

to do any sort of job on commission. The man who is ready to invest your money on a racehorse is commonly known by this name, and, roughly speaking, the man who is 'something in the City', if he does not call himself an 'accountant', calls himself a 'commission agent'. Such a person is an ordinary agent, he is liable for negligence, and has a claim for his remuneration.

CHAPTER XIV

SOME MERCANTILE DOCUMENTS

The Bill of Lading

SHIPPED, in good Order and well conditioned, by [*John Jackson & Co.*] in and upon the good Ship called the ['*Venus*'] whereof is Master for this present voyage [*Paul Jones*] and now riding at anchor in [*Hobson's Bay*] and bound for [*London*, 100 (*one hundred*) *cases whisky*] being marked and numbered as in the Margin, and are to be delivered in the like good order and well conditioned at the aforesaid Port of [*London*], (the King's Enemies, Fire, and all and every other Dangers and Accidents of the Seas, Rivers, and of Navigation, of whatever Nature or kind soever, excepted, save Risk of Boats, so far as Ships are liable to), unto [*Messrs. Anderson & Co.*] or to [*their*] Assigns, Freight for the said Goods [*being payable at the rate of Five pounds eighteen shillings sterling* (5/18/) *in London*] with Primage and Average accustomed. In witness whereof, the Master or Purser of the said Ship hath affirmed to [3] Bills of Lading, all of this Tenor and Date, the one of which Bills being accomplished the other[*s*] to stand void. Dated in [*Melbourne, Sept.* 1, 1902].

Freight & Charges £5 18*s.*

[*Paul Jones.*]

A Bill of Lading is a receipt for the goods specified as placed on board ship, which is signed by the person who contracts to carry them or by his agent, and which also sets forth the terms of the contract of carriage, the voyage, the consignor and consignee to whom or to whose order or assigns the goods are deliverable, the freight payable, and the conditions and excepted risks.

It is not the contract, for that was made before the bill of lading was signed, but it is excellent though not necessarily the sole evidence of the contract. (Per Lord Bramwell in *Sewell* v. *Burdick*.) 10 App. Cas. 74.

The terms of the contract may also be gathered from the charter-party (where there is one, and either some or all of its contents are incorporated in the bill of lading or the charterer is also the shipper, in which case the bill of lading as between charterer and shipowner is usually merely a receipt), from the mate's receipt, shipping cards, handbills, &c., or other representations.

By the law merchant, which is part of the Common Law, the bill of lading is the symbol of the goods mentioned therein, the **possession** of the bill of lading is in the eyes of the Common Law possession of the goods, and the handing over of the bill of lading is symbolical delivery of the goods; for if the goods are at sea this is the most that can be done. But what, if any,

property in the goods passes depends on the contract under which the bill of lading is handed over. (*Sewell* v. *Burdick.*)

10 Ap. Cas. 74.

Illustrations.

A., of New Orleans, sells and consigns to B., of Liverpool, 1000 bales of cotton. He sends by post the bill of lading with a bill of exchange fixed to it for B.'s acceptance, and B. accepts the bill of exchange. C. then offers to buy the cotton, B. agrees and sells it, and hands over to C. the bill of lading. C. is then owner in virtue of the sale, and is in possession by having the bill of lading in his pocket. He meets the ship and takes his cotton.

If, however, B. desires to raise money by pledging his cotton, he cannot deliver the cotton itself to the pledgee, for it is afloat, but he can do as well by handing over the bill of lading under the contract of pledge, say to a bank. The possession of the bill of lading is regarded as though the cotton were in the bank's warehouse, and the bank under the contract has not ownership in the goods but the 'special property' of the pledgee.

Such dealing with a bill of lading by way of sale is termed 'negotiation', and a bill of lading being 'to order or assigns', is negotiated by indorsement.

The Common Law did not permit the assignee or indorsee to sue or be sued in his own name on the contract of carriage set forth in the bill of lading. But by 18 & 19 Vict. c. 111, 'Every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass' is

put in the same position as regards rights of suit as though the contract had been made with him.

Although the unpaid seller of goods has parted with the possession, and thus has lost his Common Law lien for the price, he is permitted on hearing of the insolvency[1] of his buyer to stop the goods *in transitu*, *i.e.* before they have reached the hands of the buyer, and thus to prevent his goods from being used to pay another man's debts. This is done by giving notice to the carrier or his representative. The exercise of this right, though it does not generally rescind the sale, enables the unpaid seller to resell the goods and give a good title to them. (See Sale of Goods Act.) 56 & 57 Vict. c. 71, § 48.

The right of stoppage *in transitu* does not exist against an indorsee of the bill of lading who has taken it *bonâ fide* and given value for it. (*Lickbarrow* v. *Mason*; and now see Sale of Goods Act.) ib. § 47.

The contract in the bill of lading is therefore assignable, and though the bill of lading possesses some features of negotiability—viz. no notice of assignment need be given to the party to be charged, and the indorsee has rights of suit—yet

[1] A person is deemed to be insolvent for this purpose who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not. (Sale of Goods Act, 1893, § 62.)

it is not a negotiable instrument, for the indorsee takes subject to equities; *e.g.* a thief can give no title to a stolen bill of lading.

It should be noticed that in a contract for the sale of specific goods the seller may expressly reserve the right of disposal (*jus disponendi*) till certain conditions are fulfilled.

In such case, notwithstanding delivery to the buyer, the property does not pass to the buyer till the conditions are fulfilled. If goods are shipped, and by the bill of lading the goods are deliverable to the order **of the seller** or his agent, the seller is *primâ facie* deemed to reserve the right of disposal.

The nature of this right seems not free from doubt. (See *Ogg* v. *Shuter*, and *Mirabita* v. *Ottoman Bank* (judgment of Cotton, L.J.).)

1 C. P. D. 47.
3 Ex. D. 164.

The Charter-Party.

Williams & Co.,
Ship Brokers,
London, E.C.

London, [21*st March*, 1900].

CHARTER-PARTY.

IT IS THIS DAY MUTUALLY AGREED between [*A. O. Johnson Co.*], Owners of the good Sailing Ship called the [*Erling*] of the measurement of [1,216] Tons Register, or thereabouts, now [*in Norway*] and Messrs. [*Richd. R. Fox & Co.*], of [*London*]:

1.—That the said Ship being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed sail and proceed to [*Three Rivers*

(*Canada*)], or so near thereunto as she may safely get, and there load, always afloat, in a safe berth as directed after arrival from the Factors of the said Merchants, a full and complete Cargo of [*dry or bright deals and battens*] and a lawful deck load at Captain's option at full freight, with the necessary Ends 9 feet and under [*as required by Captain*] for broken stowage only, not exceeding what she can reasonably stow and carry over and above her Tackle, Apparel, Provisions, Furniture, and Fuel, and, being so loaded, shall therewith proceed to [*London*] or so near thereunto as she can safely get, and deliver the same, always afloat, as per Bills of Lading, on being paid freight, as follows :—

	£	s.	d.	
For Deals, Battens	2	12		per St. Petersburg Standard Hundred.
„ Ends, 9 feet and under . . [2/3 *freight*]				„ do. do.

[*Not over* 5 *Stds.* 9 *feet at* 2/3 *freight.*]

Freight payable on Deals, Battens, Deal Ends, and Swan Lumber on the intake measurement of pieces delivered as ascertained at the Port of Discharge, being in full of all Port Charges, Pilotages, Pierage and Primage, as customary (the Act of God, Perils of the Sea, Fire, Barratry of the Master and Crew, Enemies, Pirates and Assailing Thieves, Arrests and Restraints of Rulers, Princes, and People,

$2\frac{1}{2}$ per cent. Brokerage is due on this Charter-Party (Ship lost or not lost), to Williams & Co., and the Vessel is to be reported by them if she returns to London, or by their Agents, if to an Outport.

A True Copy of the Original Charter-Party in our possession.

Collisions, Stranding, and other Accidents of Navigation mutually excepted, even when occasioned by negligence, default or error in judgment of the Pilot, Master, Mariners, or other Servants of the Ship-owners).

2.—Freight payable as follows, viz.:—One-third in cash on arrival, less any freight advance made, and the remaining two-thirds on right and final delivery of the cargo, in cash, with two per cent. discount, less value of cargo short or damaged (if any), all in British sterling money. All the Charterers' liability to cease on delivery of cargo to vessel, Captain holding a lien upon the cargo for Freight, Dead Freight and Demurrage. The Ship to discharge in such Berth or Dock as ordered by Charterers or their Agents after arrival.

3.—The cargo to be supplied in [16] days, and to be received from the Ship at Port of Discharge [*in* 15 *working days*] (Sundays and Holidays excepted), weather, fire, floods, ice, strikes, lock-outs, or labour combinations permitting, and ten like days on Demurrage if longer detained, at the rate of fourpence per register ton per day, and *pro rata* for any part of the last of such days. Lay days to commence on Ship getting into a proper loading or discharging berth.

4.—Ship to be addressed to Charterers or their Agents at Port of Loading, free of Commission on this Charter.

5.—Charterers to advance money for Ship's ordinary disbursements at Port of Loading, if required by Captain, subject to 2½ per cent. Commission and to Premium of Insurance. Master's receipt for advances to be conclusive evidence that payment has been made on account of freight, and Charterers shall in no way be responsible for the appropriation or any misappropriation of the same.

6.—If ordered to London, and discharged in one of the Docks in the River Thames, the Freighters to pay two-thirds of the dues. Ship to call at Gravesend for orders, there giving to consignees 24 hours' notice of her expected arrival in discharging berth, and to discharge over side into lighters if required by consignees.

7.—The Cargo to be supplied to the Ship and to be taken from alongside, as customary, at each port. Only Rope Slings, or Chains properly canvassed, to be used for loading and discharging. Ship's Hold to be thoroughly swept and cleansed before taking in cargo.

8.—The Bill of Lading shall be conclusive evidence against the owners of the quantity of Cargo shipped on board, as stated therein; and in case of short delivery Owners shall produce the log book and furnish an extended protest, if demanded, showing the cause of such short delivery before balance of freight becomes due or payable.

9.—The Captain shall not be obliged to

sign more than one set of Bills of Lading [*not exceeding* 5 *in all*] unless written notice be given him before commencing to load, so as to enable him to keep separate the different consignments.

10.—The usual custom of the wood trade of each Port to be observed by each party in cases where not specially expressed.

11.—Penalty for non-performance of this Agreement, estimated amount of freight.

12.—Average, if any, to be settled according to York and Antwerp Rules, 1890, but jettison of deck load to be considered general average.

[*By authority of*
A. O. Johnson, Esq.
(*Signed*) *Williams & Co.,*
As Agents.

Witness,
(*Signed*) *Richd. R. Fox & Co.*
21/3/1900.]

A charter-party is a document which contains an agreement of a shipowner or his representative to carry a complete cargo of goods or to furnish a ship for that purpose, the shipowner letting the ship for the purpose of carrying or undertaking to carry, the **charterer** hiring the ship for such purpose or undertaking to provide a full cargo.

When the agreement is to carry goods which form only part of the intended cargo, the con-

tract as to each parcel of goods is evidenced by the document called a bill of lading.

A contract of this kind is called a contract of affreightment, and the sum to be paid for carriage is called freight.

General average is the apportionment among all the parties interested in ship or cargo of all loss arising from sacrifices made or expenses incurred for the common safety of ship and cargo.

Particular average is the incidence of loss upon the individual owner or his insurer due to damage to any part of ship or cargo.

When the charterer supplies the cargo himself, bills of lading are usually signed, which, as a rule, while in the charterer's hands, operate as receipts for the goods and as documents of title which he can negotiate, thus transferring possession, but which may be evidence of a contract varying that contained in the charter-party. (See *Rodocanachi* v. *Milburn*, and *Gullischen* v. *Stewart*.) 18 Q. B. D. 67. 13 Q. B. D. 317.

When, however, the bill of lading gets into the hands of third parties for valuable consideration, its terms become important, for it is an undertaking on the part of the shipowner with the holder, which is independent of the charter-party except so far as it is expressly incorporated, and that, even though the holder may have notice from the bill of lading that a charter-party is in existence. (*Chappel* v. *Comfort*.) 10 C. B. N. S. 802.

When the charterer carries goods for other people, each shipper gets a bill of lading for his goods evidencing the contract that he has entered into, and this is independent of the contract in the charter-party save in so far as it is expressly incorporated.

It depends on the terms of the charter-party whether the charterer acquires *pro tem.* the whole possession and control of the ship (he becoming *pro tem.* the owner, and the master and crew his servants), or merely the right to have his goods conveyed by a particular vessel, the ownership and possession remaining in the shipowner through the master and crew, who continue to be his servants. (See per Lord Esher, M.R., in *Baumvoll* v. *Gilchrest.*)

1892, 1 Q. B. 253.
1893, A. C. 8.

The distinction is important for many reasons, among which are, that if the owner is out of possession, he has no Common Law lien for the freight, that any salvage earned will go to the charterer, and that if goods are bought by the charterer and delivered to the ship's master, he being the charterer's agent, such delivery destroys the unpaid vendor's right to stop *in transitu*, unless the bill of lading was made deliverable to shipper or order.

Charter-parties vary in their terms according to the trade to which they refer. The form given above is a Canadian timber charter.

Bills of Exchange, Notes and Cheques. 45 & 46 Vict. c. 61, § 3.

A bill of exchange is an unconditional order in writing, addressed by one person, including a firm, company or association, to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer.

A bill must require payment of money and money only, not money and the execution of some other obligation or promise.

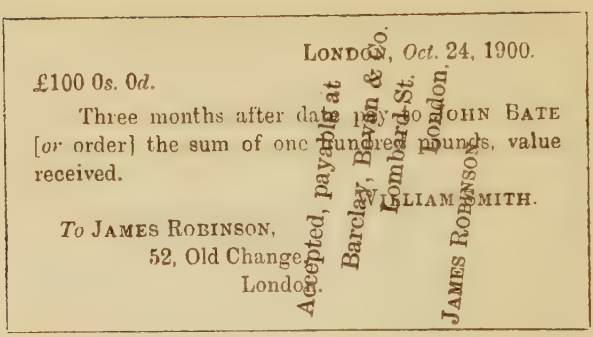
The person who gives the order is called the 'drawer'; the person to whom the order is addressed is called the 'drawee'.

The acceptance of a bill is the signification by the drawee of his assent to the order.

After the drawee has accepted he is called the 'acceptor'. The ordinary method of accepting is for the drawee to write 'accepted' across the bill and sign underneath, but he can use any form of words from which his intention to accept may be inferred.

An inland bill or note is one both drawn and § 4.
payable, or purporting to be so within the British § 83.
Islands, or drawn within the British Islands upon
some resident therein. Any other bill or note is § 89.
foreign. A foreign bill, if dishonoured, must be protested: an inland bill need not. Protest of any dishonoured note is unnecessary.

The following is a form of an inland bill of exchange:—


London, *Oct.* 24, 1900.

£100 0*s.* 0*d.*

Three months after date pay to JOHN BATE [*or* order] the sum of one hundred pounds, value received.

WILLIAM SMITH.

To JAMES ROBINSON,
52, Old Change,
London.

Accepted, payable at Barclay, Bevan & Co. Lombard St. London.
JAMES ROBINSON.

It would have been an equally good bill without the words 'value received', or without the date, as any holder may insert the true date, or what he believes to be the true date, or without the place of drawing or of payment, but the above is the regular form.

It would have been an equally good acceptance if the words used had been 'Accepted, James Robinson', or 'James Robinson' simply. Such are instances of 'general' as opposed to 'qualified' acceptances. To charge the acceptor this bill must be presented at Barclay, Bevan & Co. for payment or elsewhere, for at common law the debtor is bound to seek out his creditor and pay him.

§ 19.

§ 44. If, however, the acceptance ran 'Barclay, Bevan & Co. only', or 'as to £50', or 'when in funds', that is a 'qualified' acceptance. The holder of a bill may refuse to take a qualified acceptance, and may treat refusal to give a general acceptance as dishonour. But if he take the qualified acceptance

without the express or implied authority or subsequent assent of the drawer or an indorser, such drawer or indorser is discharged from liability on the bill.

Acceptance is not essential, though it is usual. A cheque is a bill of exchange drawn on a banker, payable on demand, and requires no acceptance.

The holder of a cheque may suffer through unreasonable delay in presenting it. § 74.

A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer. § 83.

Illustration.

LONDON, *Jan.* 16, 1900.

£100 0*s.* 0*d.*

Three months after date [*or* on demand] I promise to pay to JAMES JOHNSON or Order [*or* Bearer] the sum of one hundred pounds.

ROBERT GODFREY.

A bank note is a promissory note of the bank which issues it. § 84.

A promissory note is incomplete till delivery to the payee or bearer. The maker of the note by making it engages that he will pay it according to its tenor. § 88.

§ 89. The maker of a note corresponds to the acceptor of a bill, and the first indorser of a note to the drawer of an accepted bill payable to drawer's order.

§ 8. Unless a bill or note contains words prohibiting transfer or indicating an intention that it shall not be transferable, it is a negotiable instrument.

A negotiable instrument may be payable either to order or to bearer.

§ 8. A bill or note is payable to bearer which is expressed to be so payable or on which the only or last indorsement is an indorsement in blank.

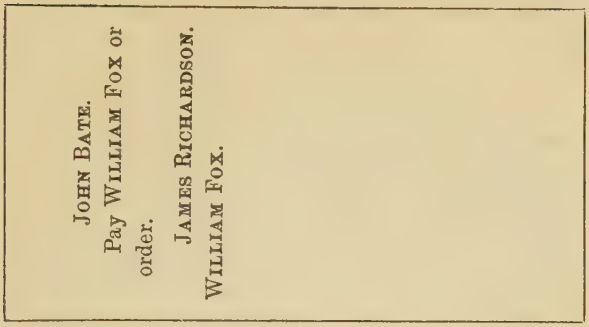
A bill or note is payable to order if so expressed to be or to be payable to a particular person, without words prohibiting transfer.

§ 31. A bill or note 'to bearer' is negotiated by delivery; a bill payable to order is negotiated by the indorsement of the holder completed by delivery; in each case there must be the intention of passing the property.

§ 32. Indorsement occurs by the simple signature of the indorser on the back of the bill; and is an order on the maker, drawee, or acceptor to pay the sum named to the next holder named, or to his order or to bearer, this depending on whether the indorsement is 'in blank' or 'special'. An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

§ 34. A special indorsement specifies the person to whom or to whose order the bill is to be payable.

The following represents the indorsements on the back of a bill:—



In the above case, John Bate, the payee (see *ante*), has indorsed in blank, and the bill has eventually got into the hands of James Richardson, till that time it has been 'to bearer' passing like cash by delivery; Richardson specially indorses it to Fox, who indorses it and seeks payment on it from James Robinson, or failing him, the prior indorsers in order.

If an indorsement is made by one having no interest in the paper, such indorsement only adds security to the instrument. See § 56.

To take a simple business transaction:—William Smith, of New York, sells to James Robinson, of London, £100 worth of goods on terms of three months' credit. Smith is also owing John Bate £200. When the goods are put on board Smith sends the bill of lading to Robinson, and pinned to it a bill of exchange in form No. 1 (with the substitution of 'New York' for 'London' at the head). Thus Robinson is directed to pay £100, within three months, to Bate; and, if he does not honour the

56 & 57 Vict. c. 71, § 19. bill of exchange, he must return the bill of lading, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

Assuming, however, that no difficulty arises on this head, Robinson accepts, and the bill is handed over to Bate. As it will be worth £100 in something under three months, it is worth something less than £100 now, and if Bate desires to get his money he can *sell* the bill to some one who will give him the face value *minus* a discount. This is the process of 'discounting' a bill. The bill can be *sold* over and over again, at a gradually enhanced price, till the day of payment arrives, when the holder, whoever he is, takes it to Robinson, presents it for payment, and get his £100.

When a bill is not payable on demand three 'days of grace' are added to the time of payment as fixed by the bill, unless the bill is expressly drawn 'without grace'. When the last day of grace falls on a Sunday, Christmas Day, Good Friday, or a day appointed by Royal Proclamation as a public fast or thanksgiving, the bill is due and payable on the preceding business day; but if the last day of grace is a Bank Holiday (other than Christmas Day or Good Friday), or when the last day of grace is a Sunday, and the second day of grace is a Bank Holiday, then on the succeeding business day.

§ 14.

The drawee of a bill, by accepting, engages that he will pay it according to the tenor of his acceptance.

§ 55. The drawer of a bill engages that, on due presentment, it will be accepted and paid, and that if it be dishonoured he will be liable to the holder.

An indorser engages that, on due presentment, it will be accepted and paid, and that if it be dishonoured he will be liable to the holder or any subsequent indorser.

Thus the persons primarily liable on a bill are the acceptor or acceptors, on a note the maker or makers ; those who are not so primarily liable, but who occupy rather the position of sureties, are the drawee and indorser or indorsers, and the law requires that notice be given them of dishonour, and that the holder looks to them for payment. The indorsers, as between each other, stand in the relation of principals, every prior indorser being, as a rule, bound to indemnify a subsequent indorser, because, as a rule, he has sold him a document which has proved worthless.

During the currency of the bill as it passes, like cash, from hand to hand, it may pass through the hands of far more persons than the indorsers ; when the bill has been indorsed in blank it is not essential, *in order to transfer the property*, that the transferor should put his name to the bill, but he must do so if it is wished to make him a party to the bill *in order that he may be sued as an indorser.* No one can be sued *on a bill* who has not put his name to it.

But a transferor by delivery who negotiates a bill thereby warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of the transfer he is not aware of any fact § 58. that renders it valueless.

30. Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value, though this presumption is rebuttable: and every holder is *primâ facie* deemed to be a holder in due course.

But if it be proved that the issue, acceptance, or negotiation of the bill has been affected by fraud, duress, or illegality, the burden of proof is shifted, until the holder proves that subsequent to the fraud or illegality value has in good faith been given for the bill.

§ 64. A material alteration of a bill or acceptance, without the assent of all parties liable on the bill avoids it, except as against the party who has made authorised, or assented to the alteration and subsequent indorsers, though if the alteration be not apparent, a holder in due course may enforce payment as if it had not been altered.

§ 29. A holder in due course is one who has taken a bill before it was overdue, and without notice that it had been dishonoured, if such was the fact, and in good faith and for value, and without notice of any defect in the title of his transferor. He must not have a suspicion of something wrong and wilfully disregard the means of knowledge. (*Raphael* v. *Bank of England*; *Jones* v. *Gordon*.)

17 C. B. 174. 2 Ap. Cas. 627.

§ 27. It is not necessary that the holder himself shall have given value; it is enough if value has been given somewhere during the currency of the bill.

§ 28. An accommodation bill is one which has been drawn, accepted, or indorsed by a person without

receiving value, for the purpose of accommodating another person by lending him his name.

Such a bill, as between the immediate parties, is void for want of consideration, but is good in the hands of a holder for value.

Ad valorem stamp duty is payable on all bills and notes, and a further duty upon the protest or noting of a bill. 33 & 34 Vict. c. 97, § 55.

The cheque and its 'crossings'.

A cheque may be crossed by the drawer or any holder, and if crossed generally the holder may cross it specially, or add the words 'not negotiable'. Such a crossing is a material part of the cheque. § 77. § 78.

A cheque is crossed generally when two parallel transverse lines are drawn across its face, either with or without the words 'and Co.' in between, or with or without the words 'not negotiable'. § 76.

It is crossed specially when, with or without the words 'not negotiable', the cheque bears across its face in addition the name of a banker.

A general crossing is a direction to the banker on whom the cheque is drawn not to pay it otherwise than to a banker; a special crossing is a direction not to pay it otherwise than to the banker to whom it is crossed. If he disregards these directions he is liable to the true owner of the cheque for the resulting damage. § 79.

The addition of the words 'not negotiable' have this effect, that a person taking a cheque so marked has not and cannot give a better title to the cheque than had the person from whom he took it.

The addition of the words 'account payee' to

a specially crossed cheque as a matter of practice renders the cheque 'not negotiable', and insures it passing through the payee's account. This is the strictest and safest method of crossing a cheque; though this crossing is not authorised by the Act as a material part of the cheque, the fraudulent obliteration of the words is a forgery.

APPENDIX A

The Joint Stock Company: Its Memorandum, Articles of Association, and Prospectus

The Memorandum provides the name of the company and its registered office; it states, whether it is limited by shares or guarantee, or unlimited; *the objects for which the company is formed;* should the company be limited, if by shares, the nominal amount of capital and nominal amount of shares, if by guarantee, the amount of which each guarantor is liable.

The Articles comprise the regulations of the company, dealing with the terms on which shares are held, and upon which its capital can be reduced or increased, the appointment, remuneration and powers of its directors, and the way in which its business shall be conducted.

The Prospectus inviting application for shares from the public contains a copy of the memorandum showing the objects of the company, and usually states the nature of the company's business, the reasons for raising the proposed capital, and the prospects of the company to earn profits available for dividend on that capital. Such a prospectus must, under section 80 of the Companies (Consolida-

tion) Act, 1908, state, amongst other things, the contents of the memorandum, the names, description, and addresses of the signatories ; the shares subscribed for by them respectively, the numbers of founder's shares, the necessary qualification and remuneration of the directors, their names, description and addresses ; the minimum subscription on which they may proceed to allotment, the number and amount of shares and debentures to be issued, and the consideration for such, and the amount for which they are paid up ; the names and addresses of the vendors of properties to be acquired, the amount of purchase money, of commission, of preliminary expenses, and of promotion money ; the dates and parties to every material contract, and the place where such contract may be inspected ; the names and addresses of the auditors (if any), and full particulars of the interest of every director in the promotion of, or in the property to be acquired by the company.

Non-compliance with these rules may make the persons responsible for the issue of the prospectus—*i.e.* the directors and promoters—liable to persons taking shares on the faith of that prospectus who are injured by the omission of any of these particulars.

But no liability shall attach if such non-compliance is due to want of cognisance, or to honest mistake of fact.

APPENDIX B

Common Law, Statute Law, and Equity

The phrase 'Common Law' is sometimes contrasted with 'Statute Law', sometimes with 'Equity'. Statute Law is the law contained in Acts of Parliament, and these it is the business of the judges to interpret as well as they can, but not to amend. Statute Law can only be amended by fresh legislation. The Common Law did not originate in Acts of Parliament. In our early history, when justice was administered in local courts without professional assistance, different customs obtained in different parts of the country. When the king commenced to send Royal judges on circuit they formed, by a process of selection and rejection, a body of law which they applied everywhere. This was the custom of the King's Court, or the Common Law of the land. To set this law in motion, a plaintiff had to get a 'writ', from the writ office where the clerks were employed under the supervision of the Chancellor and judges in drawing up writs to meet the various complaints brought before them. The Common Law thus was the law administered by the King's Courts of King's Bench, Common Pleas, and Exchequer; that is, it was based on the decisions given by the judges

of these three courts in cases falling within the writs issued by the writ office, and these writs, as time went on, increased in number and variety. But this was not all. The Common Law was nowhere written down, and the judges considered themselves free to apply the principles already established to new circumstances of an analogous kind. The Common Law was said to reside *in gremio judicum*, capable of supplying a remedy for every wrong, *ubi jus ibi remedium*, capable of expanding *pari passu* with the increasing complexity of national life. Sir Edward Coke said that it was the 'perfection of reason'. It was regarded not as a thing to be made, but a thing to be discovered, and uniformity of decision was attained by a system of appeals, in which the judgment of a higher court bound that court and the courts below. The Common Law could be altered by statute, which the Courts were bound to obey. The Common Law Courts sat for centuries in Westminster Hall, and the remedy they gave was damages. As a fact the Common Law did not expand fast enough, and the conservative tendencies of the judges called into existence what we know as Equity. The body of rules called Equity was administered by the Court of Chancery, which did not pretend to administer the law, but a system inherently superior to it, because it approximated more nearly to justice, to what was *aequum et bonum*. The origin of this remarkable system lay in the deep-rooted belief, found in East and West alike, that the king is the last resort of the oppressed. Justice may surely be found, if nowhere else, by the suppliant at the foot

of the throne. Where the Common Law gave inadequate relief, or none at all, petitions were sent to the king, who handed them on to his Council, and especially to his Chancellor, who at first made orders at discretion. But in time the practice observed became settled, and the Courts of Chancery or Equity became, as Blackstone says, 'governed by established rules and bound down by precedent'. The Chancellor's Court was not a law court, and could not give damages, nor could it direct the Sheriff to levy execution on property. The Chancellor was said to have jurisdiction *in personam*. He could summon, by a writ of subpœna, a person against whom there was a complaint, he could make a decree of *specific performance*, directing the person to do some specific thing, or issue an injunction forbidding him to do something; and if his directions were disregarded, this was a contempt of the Royal authority, and the offender was arrested and imprisoned till he had purged his contempt. Equity became a great supplementary system, which differed from the Common Law in remedies, procedure, and often in the view it took of the rights and duties of the parties, *e.g.* in trusts and mortgages. This inconvenient state of things was terminated by the Judicature Act of 1873, which provided that where the rules of law and equity conflicted, those of equity were to prevail. This has been called the 'fusion of Law and Equity', but perhaps we may accept the late Professor Maitland's view that Equity was a loosely knit collection of appendixes to the Common Law which are by statute now incorporated in the text.

APPENDIX C

Inferred Contract—Implied Contract—Quasi-Contract

Though in the text, from deference to general usage, the expression 'implied contract' is employed, when 'contract inferred from conduct' is meant, it may be observed that the verbs 'to infer' and 'to imply' are not synonymous. To use them as if they were, is a vulgarity. To 'infer' means to deduce by reasoning; to 'imply' means to involve as a consequence or concomitant. A person 'infers'; a state of things 'implies'. Thus we may have a contract inferred as a fact by a jury, or an obligation implied in a contract as a matter of law.

An 'inferred' contract is one which, though not expressed in words, is found by a jury as a fact to exist.

An 'implied' obligation, or term, is supplied by the law *where a contract already exists*, as a right which results from the position in which the parties have placed themselves by the contract. Thus there is an implied obligation on a grantor not to derogate from his own grant. Such an obligation arises, not from any interpretation of the conveyance, but from the duty which is imposed on the grantor in con-

sequence of the relation which he has taken upon himself towards the grantee. (See judgment of Cotton, L.J., in *Birmingham, Dudley and District Banking Co.* v. *Ross.*) 38 Ch. D. 308.

But the term 'implied contract', or 'contract implied in law', has also been used *where no contract at all exists.* Here the term quasi-contract' is preferred by some. There is in fact no contract, but a condition of affairs has arisen between the parties, such that according to natural justice and equity one party is bound to pay a sum of money to the other. (*Freeman* v. *Jeffries*, per Martin, B.) L. R. 1 Ex. at p. 199.

So where one person has been compelled under threat of legal proceedings or legal restraint of his goods to pay money which another *is bound to pay*, he can recover the money, as having been paid to the use of the defendant: *e.g.* where an executor has been compelled to pay legacy duty, the charge of which falls upon the legatee (*Hales* v. *Freeman*), 1 B. & B. 391. or where a person has, under circumstances of necessity, paid for the funeral of a woman, a duty imposed by law on her husband (*Rogers* v. *Price*), or 3 Y. & J. 28. where the owner of goods, left on the premises of another at his request and for his benefit, is compelled to pay out a distress, in order to recover his goods (*Exall* v. *Partridge*). 8 T. R. 308.

So where a defendant has received money, which in justice and equity belongs to the plaintiff, under circumstances which render the receipt by the defendant a receipt for the use of the plaintiff, the plaintiff has an action for money had and received to his use.

Thus an insurer, who has paid for a loss, can recover from the assured money subsequently received by the latter from third parties in respect of the loss (*Dufourcet* v. *Bishop*). So money paid under a mistake of fact, where the supposed state of fact, had it existed, would have created a liability to pay the money, *e.g.* money paid for goods under a mistake as to weight or measurement. (*Cox* v. *Prentice.*)

18 Q. B. D. 373.

3 M. & S. 344.

So also an account stated between the parties, or a foreign judgment produces a quasi-contractual liability.

In all these cases there is no contract, but the law behaves as though there were.

APPENDIX D

SALE OF GOODS ACT, 1893

[56 & 57 Vict. c. 1871.]

ARRANGEMENT OF SECTIONS

PART I

FORMATION OF THE CONTRACT

Contract of Sale

The Price

SECTION

8. Ascertainment of price.
9. Agreement to sell at valuation.

Conditions and Warranties

10. Stipulations as to time.
11. When condition to be treated as warranty.
12. Implied undertaking as to title, &c.
13. Sale by description.
14. Implied conditions as to quality or fitness.

Sale by Sample

15. Sale by sample.

PART II

Effects of the Contract

Transfer of Property as between Seller and Buyer

16. Goods must be ascertained.
17. Property passes when intended to pass.
18. Rules for ascertaining intention.
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Transfer of Title

21. Sale by person not the owner.
22. Market overt.
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24. Revesting of property in stolen goods on conviction of offender.
25. Seller or buyer in possession after sale.
26. Effect of writs of execution.

PART III

SECTION PERFORMANCE OF THE CONTRACT

PART IV

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

Unpaid Seller's Lien

Stoppage in transitu

CHAPTER LXXI

An Act for codifying the Law relating to the Sale of Goods. [20th February, 1894.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

PART I

FORMATION OF THE CONTRACT

Contract of Sale

Sale and agreement to sell.

1.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale ; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the

time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Capacity to buy and sell.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract

Contract of sale, how made.

3. Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

Contract of sale for ten pounds and upwards.

4.—(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or

memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4) The provisions of this section do not apply to Scotland.

Subject-matter of Contract

Existing or future goods.

5.—(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called 'future goods'.

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

Goods which have perished.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

Goods perishing before sale but after agreement to sell.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

The Price

Ascertainment of price.

8.—(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Agreement to sell at valuation.

9.—(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Conditions and Warranties

10. Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. Stipulations as to time.

(2) In a contract of sale 'month' means *primâ facie* calendar month.

11.—(1) In England or Ireland— When condition to be treated as warranty.

(*a*) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated :

(*b*) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract :

(*c*) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to

the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2) In Scotland, failure by the seller to perform any material part of a contract for sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

Implied undertaking as to title, &c.

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

(3) An implied warranty that the goods shall be

free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

Sale by description.

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Implied conditions as to quality or fitness.

14. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

(2) Where goods are bought by description from

a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality ; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed :

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Sale by Sample

Sale by sample.

15.—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample—

(*a*) There is an implied condition that the bulk shall correspond with the sample in quality:

(*b*) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample :

(*c*) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II

Effects of the Contract

Transfer of Property as between Seller and Buyer

Goods must be ascertained.

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Property passes when intended to pass.

17.—(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Rules for ascertaining intention.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does

not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval, or 'on sale or return' or other similar terms, the property therein passes to the buyer:—

(*a*) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(*b*) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods

thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Reservation of right of disposal.

19.—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully

retains the bill of lading the property in the goods does not pass to him.

Risk *prima facie* with property.

20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

Transfer of Title

Sale by person not the owner.

21.—(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Provided also that nothing in this Act shall affect—

(*a*) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(*b*) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Market overt.

22.—(1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2) Nothing in this section shall affect the law relating to the sale of horses.

(3) The provisions of this section do not apply to Scotland.

Sale under voidable title.

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Revesting of property in stolen goods on conviction of offender.

24.—(1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3) The provisions of this section do not apply to Scotland.

Seller or buyer in possession after sale.

25.—(1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term 'mercantile agent' has the same meaning as in the Factors Acts.

Effect of writs of execution.

26. (1) A writ of *fieri facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be

executed ; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2) In this section the term 'sheriff' includes any officer charged with the enforcement of a writ of execution.

(3) The provisions of this section do not apply to Scotland.

PART III

Performance of the Contract

Duties of seller and buyer.

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Payment and delivery are concurrent conditions.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price ; and the buyer must be ready

and willing to pay the price in exchange for possession of the goods.

Rules as to delivery.

29.—(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contracts be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

Delivery of wrong quantity.

30.—(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the

buyer may reject them, but if the buyer accept the goods so delivered he must pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

Instalment deliveries.

31.—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable

breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

Delivery to carrier.

32.—(1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *primâ facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

Risk where goods are delivered at distant place.

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

34.—(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. Buyer's right of examining the goods.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. Acceptance.

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them. Buyer not bound to return rejected goods.

37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for Liability of buyer for neglecting or refusing delivery of goods.

a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART IV

Rights of Unpaid Seller against the Goods

Unpaid seller defined.

38.—(1) The seller of goods is deemed to be an 'unpaid seller' within the meaning of this Act—

(*a*) When the whole of the price has not been paid or tendered;

(*b*) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this part of this Act the term 'seller' includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

Unpaid seller's rights.

39.—(1) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(*a*) A lien on the goods or right to retain them for the price while he is in possession of them;

(*b*) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them ;

(*c*) A right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

Attachment by seller in Scotland.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding ; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

Unpaid Seller's Lien

Seller's lien.

41.—(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :—

(*a*) Where the goods have been sold without any stipulation as to credit ;

(*b*) Where the goods have been sold on credit, but the term of credit has expired ;

(*c*) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien, notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

Part delivery.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

Termination of lien.

43.—(1) The unpaid seller of goods loses his lien or right of retention thereon—

(*a*) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(*b*) When the buyer or his agent lawfully obtains possession of the goods;

(*c*) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in transitu

Right of stoppage *in transitu*.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

Duration of transit.

45.—(1) Goods are deemed to be in course of transit from the time when they are delivered to a

carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the

remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

How stoppage *in transitu* is effected.

46.—(1) The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the direction of, the seller. The expenses of such re-delivery must be borne by the seller.

Re-sale by Buyer or Seller

Effect of sub-sale or pledge by buyer.

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers

the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.

Sale not generally rescinded by lien or stoppage *in transitu*.

48.—(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*.

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V

Actions for Breach of the Contract

Remedies of the Seller

Action for price.

49.—(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

Damages for non-acceptance.

50.—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Remedies of the Buyer

51.—(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. Damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

52. In any action for breach of contract to deliver specific or ascertained goods the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to Specific performance.

damages, payment of the price, and otherwise, as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

Remedy for breach of warranty.

53.—(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods ; but he may

(*a*) set up against the seller the breach of warranty in diminution or extinction of the price ; or

(*b*) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *primâ facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5) Nothing in this section shall prejudice or affect

the buyer's right of rejection in Scotland as declared by this Act.

Interest and special damages.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI

Supplementary

Exclusion of implied terms and conditions.

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

Reasonable time a question of fact.

56. Where, by this Act, any reference is made to a reasonable time, the question what is a reasonable time is a question of fact.

Rights &c., enforceable by action.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

Auction sales.

58. In the case of a sale by auction—

(1) Where goods are put up for sale by auction in lots, each lot is *primâ facie* deemed to be the subject of a separate contract of sale:

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary

manner. Until such announcement is made any bidder may retract his bid:

(3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer:

(4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

Payment into court in Scotland when breach of warranty alleged.

59. In Scotland where a buyer has elected to accept goods which he might have rejected and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

Repeal.

60. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything

done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

Savings.

61.—(1) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

Interpretation of terms.

62.—(1) In this Act, unless the context or subject matter otherwise requires,—

'Action' includes counterclaim and set off, and in Scotland condescendence and claim and compensation;

'Bailee' in Scotland includes custodier:

'Buyer' means a person who buys or agrees to buy goods:

'Contract of sale' includes an agreement to sell as well as a sale:

'Defendant' includes in Scotland defender, respondent, and claimant in a multiplepoinding:

'Delivery' means voluntary transfer of possession from one person to another:

'Document of title to goods' has the same meaning as it has in the Factors Acts:

52 & 53 Vict. c. 45. 53 & 54 Vict. c. 40.

'Factors Acts' mean the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same:

'Fault' means wrongful act or default:

'Future goods' means goods to be manufactured or acquired by the seller after the making of the contract of sale:

'Goods' include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale:

'Lien' in Scotland includes right of retention:

'Plaintiff' includes pursuer, complainer, claimant in a multiplepoinding and defendant or defender counterclaiming:

'Property' means the general property in goods, and not merely a special property:

'Quality of goods' includes their state or condition:

'Sale' includes a bargain and sale as well as a sale and delivery:

'Seller' means a person who sells or agrees to sell goods:

'Specific goods' means goods identified and agreed upon at the time a contract of sale is made:

'Warranty' as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2) A thing is deemed to be done 'in good faith' within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4) Goods are in a 'deliverable state' within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

63. This Act shall come into operation on the Commencement.

first day of January one thousand eight hundred and ninety-four.

Short title.

64. This Act may be cited as the Sale of Goods Act, 1892.

Section 60.

SCHEDULE

This schedule is to be read as referring to the revised edition of the statutes prepared under the direction of the Statute Law Committee.

ENACTMENTS REPEALED

Session and Chapter.	Title of Act and Extent of Repeal.
1 Jac. 1, c. 21 . .	An Act against brokers. The whole Act.
29 Cha. 2, c. 3 . .	An Act for the prevention of frauds and perjuries. In part; that is to say, sections fifteen and sixteen.*
9 Geo. 4, c. 14 . .	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements. In part; that is to say, section seven.
19 & 20 Vict. c. 60	The Mercantile Law Amendment (Scotland) Act, 1856. In part; that is to say, sections one, two, three, four, and five.
19 & 20 Vict. c. 97	The Mercantile Law Amendment Act, 1856. In part; that is to say, sections one and two.

* Commonly cited as sections sixteen and seventeen.

INDEX

THE END.

CORRIGENDA

P. 68, last line, *for* small *read* all
P. 75, last line, *for* but *read* and in the case of a negotiable instrument
P. 97, line 11, *for* Lawson *read* Lamson
P. 111, line 2, *for* gaining *read* gaming
P. 179, line 15, *for* for *read* from
P. 180, line 7, *for* 1832 *read* 1882

ADDENDA

The following recent Cases should be considered :—

P. 28. *Hirachand Pernamchand* v. *Temple*, 1911, 2 K. B. 330.
P. 36. *Hanau* v. *Ehrlich*, 1912, A. C. 39.
,, ,, *Prested Miners Co.* v. *Gardner Ltd.* 1911, 1 K. B. 425, C. A.
P. 52. *Cowarn* v. *Nield*, 1912, 2 K. B. 419.
P. 83. *Wallis & Wells* v. *Pratt & Haynes*, 1911, A. C. 394.
P. 84. *London Gen. Omnibus Co.* v. *Holloway*, 1912, 2 K. B. 72, C. A.
P. 106. *In re O'Shea, ex parte Lancaster*, 1911, 2 K. B. 981, C. A.
P. 145. *Chaplin* v. *Hicks*, 1911, 2 K. B. 787, C. A.
P. 164. *Stoddart* v. *Union Trust Co. Ltd.* 1912, 1 K. B. 181, C. A.
P. 171. *Wilkes* v. *Spooner*, 1911, 2 K. B. 473, C. A.